

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 18, 2008 Session

STATE OF TENNESSEE v. MELVIN CRUMP

**Appeal from the Criminal Court for Davidson County
No. 2004-D-3137 Walter C. Kurtz, Judge**

No. M2006-02244-CCA-R3-CD - Filed March 18, 2009

The defendant, Melvin Crump, was convicted by a Davidson County Criminal Court jury of first degree premeditated murder, first degree felony murder based upon the predicate crime of rape, first degree felony murder based upon the predicate crime of larceny, and aggravated sexual battery. At the capital sentencing hearing, the jury imposed a life sentence for the first degree murder conviction. The trial court merged the defendant's murder convictions and granted the defendant's motion to set aside the aggravated sexual battery conviction based upon the statute of limitations. In this appeal, the defendant raises the following issues: (1) the evidence was insufficient to prove murder, either premeditated or felony, (2) the delay between the defendant's original indictment in 1988 and his later indictment in 2003 and 2004, with the commencement of the trial in 2006, deprived him of his rights to speedy trial and to due process under the Tennessee and United States Constitutions, (3) the jury pool was contaminated when inadmissible, unconstitutionally obtained evidence reached the jury pool and at least one juror and when the State violated Batson v. Kentucky during jury selection, (4) the trial court erred in ruling that the defendant could be impeached by his unconstitutionally obtained 1988 confession and would be subject to unlimited cross-examination even if he testified only on the limited subject of the admissibility of biological sample evidence obtained from him after his 1988 arrest, (5) the trial court erred when it denied the defendant's Motion to Dismiss Indictment Due to Police and Prosecutorial Misconduct and in the remedy it fashioned when the court granted defendant's Motion to Suppress fruits of the 1988 confession, (6) the trial court erred when it admitted expert opinion testimony from witnesses who did not have education, experience, or training in the subject area, and had never seen the subject discussed in any relevant scientific literature, (7) the deputy medical examiner should not have been permitted to testify as a State's fact witness about the autopsy report because the medical examiner who performed the autopsy was available, (8) there were multiple, prejudicial instances of prosecutorial misconduct, (9) the trial court erred in allowing the former medical examiner Dr. Charles Harlan to be questioned repeatedly regarding charges brought against him to the medical licensing board and the findings of that board, (10) the trial court erred by denying defendant's request for a "missing witness" instruction regarding a DNA hair expert the State flew in from another state who was not called and sent home, (11) the indictment should have been dismissed on grounds of double jeopardy, and (12) the various errors occurring in the trial court constitute cumulative error requiring reversal. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

Edmund L. Carey, Jr., Nashville, Tennessee, for the appellant, Melvin Crump.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and John C. Zimmerman and Kathy Morante, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The defendant's convictions relate to the August 28, 1988 sexual assault and murder of Eliza Mae Smith, after the defendant absconded from a Department of Correction work detail. The defendant was arrested on September 27, 1988. He gave an inculpatory statement and was charged with Ms. Smith's murder. The trial court granted the defendant's pretrial motion to suppress the statement based upon a violation of the defendant's rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). On the State's interlocutory appeal, the Tennessee Supreme Court upheld the suppression. State v. Crump, 834 S.W.2d 265 (Tenn.), cert. denied, 506 U.S. 905 (1992). The prosecution was dismissed thereafter on the State's motion. Additional evidence was received as a result of the development and increasing availability of DNA technology, and the present action was commenced by reindictment of the defendant on August 11, 2003, for felony murder in the perpetration of rape, in the perpetration of larceny, and in the perpetration of aggravated rape. The State filed a notice of intent to seek the death penalty. A superseding indictment was filed on December 14, 2004, charging the defendant with first degree premeditated murder, first degree felony murder in the perpetration of rape, first degree felony murder in the perpetration of larceny, and aggravated rape. See T.C.A. §§ 39-2-202 (1988) (first degree murder); 39-2-603 (1988) (aggravated rape).

At the trial, William Lewis Smith, the victim's son, testified he went to check on the victim at 9:30 p.m. on August 26, 1988. He said that he normally checked on the victim two or three times a week. He said that on August 26, he knocked several times on the victim's door but that there was no answer. He said he found the back door open. He testified that the house was dark and that he knew something was wrong because the victim never left the door open at night with the lights off. He said he found the victim, who was dead, on her bed with her nightgown pulled up, exposing her pubic area, and a lamp cord around her neck. He said that the victim collected ash trays, although she did not smoke and did not like others smoking in her home. He said the victim had limited means from her Social Security income and did not keep money in her apartment. He denied that his mother had any relationships with men.

Robert Moore, a retired detective sergeant with the Metropolitan Police Department's murder squad, testified that he responded to the victim's apartment between 9:00 and 10:00 p.m. He said that the crime scene was secured by several uniformed police officers who were there as first responders. He said the identification unit was called to process the crime scene. He said that everything in the victim's living room appeared to be well kept but that one cushion was missing from the couch. He said the victim's kitchen was also neat. He testified that in the bedroom the covers were in disarray and that the victim was lying with her head at the foot of the bed. He said the cushion from the living room couch was wedged between the nightstand table and the bed. He said that an extension cord was tied around the victim's neck, that the victim's nightgown was pulled up to her waist exposing her pubic area, and that the victim was not wearing panties. He said that there was a towel wedged partially under the victim's buttocks between her legs and that her legs were open. He testified there was a small amount of blood coming from the victim's mouth, blood coming from both of the victim's ears, and ligature marks on the victim's neck from the extension cord that was still around the victim's neck.

During Detective Moore's testimony, the State read the following stipulated statement:

The parties in this matter do hereby stipulate that the witness, Larry Cartwright, is deceased, and therefore, unable to testify in this matter. The parties do hereby stipulate that if Mr. Cartwright was available to testify in this matter, his testimony would be substantially as follows. On August 26th, 1988, he was supervising a painting crew working at the community center located at 1811 Osage in Nashville, Tennessee. Melvin Crump was a member of the painting crew. The crew, including Melvin Crump, arrived at the community center at approximately 8:15 a.m. At 9:15, Mr. Cartwright noticed that Melvin Crump had left the job site, was missing, and Mr. Cartwright did not see Melvin Crump again that day. Mr. Cartwright observed that Melvin Crump was wearing a blue shirt on the morning of August 26th, 1988, at the job site. The parties further stipulate that the defendant is the person that Mr. Cartwright would identify as Melvin Crump.

Detective Moore testified that he and other officers returned to the crime scene on August 27, 1988, and canvassed the neighborhood searching for witnesses. He said that over the next thirty days, they came up with several possible suspects, one of whom was the defendant. He said he and several other officers went to Margaret Williams's home on September 27, 1988, to look for the defendant. He said that the defendant tried to climb out a bedroom window but that he was taken into custody.

On cross-examination, Detective Moore acknowledged that a photograph depicted a white sheet placed over the victim's pubic area, which was done as a courtesy to the victim. He said he was not sure who placed the sheet over the victim, where the sheet came from, or whether it was the

same sheet shown earlier that had blood and fecal matter on it. Detective Moore admitted that “it would be very detrimental to a scene to start contaminating evidence . . . to pick up a sheet with stains on it and moving it. It’s a practice that I would not do, and I don’t think anyone working with us would do.”

Detective Moore identified a photograph of an ashtray in the bedroom with two filtered cigarette butts and one non-filtered cigarette wrapping paper that may have contained marijuana. He did not recall any discussions that the rolled cigarette in the ashtray was marijuana and did not think anyone would have labeled it as marijuana until it had been sent to the lab and tested. He said he was not aware that another officer discovered a marijuana cigarette and white powder residue at the foot of the victim’s bed.

Detective Moore testified that there were pry marks on the back door but that it was impossible to determine whether they were new or old. He said that there was no evidence that the person who attacked the victim used force to enter the apartment.

Detective Moore identified a photograph of a hat found outside the victim’s backdoor. He said that the hat belonged to Larry Jones, a person who slept on the back porch occasionally and was frequently in the neighborhood. He said that Larry Jones was interviewed extensively and that he was eliminated as a suspect in the early stages of the investigation.

Johnny L. Hunter, a retired sergeant with the Metropolitan Police Department, testified that as part of the identification division, he conducted the investigation at the crime scene after the initial walk-through. He said that he arrived at the victim’s apartment around midnight. He said that they always took photographs before anything was disturbed and that they then took measurements of different items they thought might be important as evidence. He said they made diagrams of the scene based on these measurements and photographs. Hunter said that they found fresh marks on the front door that looked like someone had tried to pry his or her way into the apartment and that they photographed and made casts of the marks. He said there was no real way to know if the pry marks were old or new. The witness noted that Officer Charles Michael Anglin was the primary officer responsible for collecting the evidence in this case. He said that he and Officer Charles Blackwood collected some additional items themselves, as well as some evidence from the victim’s body after it had been taken to the Forensic Science Center. He said they followed procedure by going to the medical examiner’s office and examining the victim’s body again under better lighting. He said that the victim’s body was fumed for fingerprints but that they did not find any. He said that he did not recall how many fingerprints were lifted at the crime scene but that the only print that matched anyone matched the victim.

On cross-examination, Sergeant Hunter stated he was satisfied the scene was preserved and not contaminated. He said Officer Blackwood used an alternative light source at the scene, but he did not remember seeing any indications of semen or urine on the bed. He explained that an alternative light source is used to see fingerprints, fiber, hair, urine, and semen. He stated, however, that the alternative light source does not always show fluids that have been left behind.

Officer Mike Anglin, who retired from the Metropolitan Police Department in June 2004, testified that he arrived at the crime scene at 11:00 p.m. on August 26, 1988. He said he helped Officer Wilson with the measurements for the diagram. He identified the diagram of the victim's apartment. He described the method by which evidence was collected, marked, and documented, as well as the property evidence logs that were filled out by Officer Ray as things were collected. He said the physical evidence collected included a yellow towel that appeared to have fecal matter on it, a fitted sheet which appeared to have fecal matter, blood, and bodily fluids on it. He said they also collected a washcloth from the bedroom floor that appeared to have semen on it. He said a washcloth from the sink had some fecal matter and brown stains on it.

On cross-examination, Officer Anglin testified that the property records reflected that fifty-five separate items were collected from the crime scene. He said the property sheets indicated a hair was recovered from the victim's right hand, and he assumed it was preserved for testing. He did not recall finding any white powder near the bedroom table. He acknowledged a discrepancy between the property records that said the yellow towel was found at the victim's feet and the photos that showed the yellow towel between the victim's legs closer to her midsection. He also acknowledged they did not take a photograph of what was under the yellow towel on the bed, but he said he did not recall anything being under the towel.

Fanny M. Parker testified that in 1988, her billfold had been stolen from her unlocked car at a convenience store. She identified a photograph depicting cards belonging to her daughter and to her that had been in her billfold. She said detectives came to her house a few days after her billfold had been stolen to ask her about the cards, which had been found at the victim's apartment. She told the detectives that her billfold had been stolen and that she had found a t-shirt in her car that appeared to have blood on it. She said that two or three years before the trial, the detectives came to her again and had her ride with them to show them the Kwik Sak Market where her billfold had been stolen. She said she did not know the victim or the defendant and did not know how the cards from her billfold got to the victim's apartment.

On cross-examination, Parker said that she lived near the Kwik Sak Market at the time of the crime. She acknowledged that she did not remember what time of day it was when she went to the Kwik Sak but said that it might have been evening, although it was not dark. She said she thought she was at her niece's house and was running late, heading back to her house before going to work. She said that she was probably supposed to be at work at 3:00 p.m. and that it would take her about thirty minutes to get there from her home. She initially said she could not remember if her purse was in the car, but then she said she remembered that she left her purse in the car. She admitted she was not sure whether the t-shirt was blue or white. She could not remember all of the cards that were in her billfold at the time. She denied telling Detective Elam that she had been at the Maxwell House Hotel but admitted that one of her daughters had worked at the Maxwell House Hotel briefly.

Detective Gordon McGwire of the Metropolitan Police Department testified that he participated in the investigation of the victim's murder as a member of the adult sexual abuse unit. He said that he was notified that they thought the victim had been raped and that he joined the

homicide detectives at the scene for the collection of serology evidence. He said he noticed a cushion missing from the living room couch during the walk-through of the apartment. He said that the victim was lying on the bed with her house coat pulled up past her waist with her vagina exposed. He said he told Dr. Gretel Harlan, the medical examiner on duty, that he needed a vaginal swab, an anal swab, and an oral swab, which he said were for the purpose of testing for semen or sperm. He identified the rape kit he had filled with the evidence collected by Dr. Harlan. He said that he took the rape kit to the drying room at the police department and that it was later taken to the Tennessee Bureau of Investigation (TBI) lab. He said the victim had a small amount of blood coming from her vagina and from each ear. He said he did not recall collection of a pubic hair found in the victim's mouth.

On cross-examination, Detective McGwire said that if he had stated the victim's time of death as 9:00 a.m., this was only an approximate time. He said he took the house dress, the slip, and the washcloths from the bathroom to the TBI lab even though they were not listed on the report. He said he took the items he thought had the best chance to have some residue or trace evidence on them for examination.

Officer Charles Blackwood testified that he worked for the Metropolitan Police Department for about twenty-three years, during which time he took several classes on latent fingerprint development and use of alternative light sources. He said he arrived at the crime scene at about 11:00 p.m. He said he was also not able to develop usable latent fingerprints from the bank card and calling card found at the victim's apartment. He said that typically, extension cords were not good surfaces on which to find latent prints. On cross-examination, Officer Blackwood said he used an alternative light source at the victim's apartment to look for small trace evidence. He admitted, "I did not note and did not mark anything that I recall or indicate any kind of stain that I would have noticed."

Margaret Williams testified that the police came to her house on September 27, 1988, to arrest the defendant, who had been living there for about a month. She said that the police arrived at her house between 10:00 and 11:00 a.m. and that she told them that the defendant was upstairs. She said she saw the defendant coming out the bedroom window. Ms. Williams stated that on the day in August that the defendant first came to her house, he did not leave the house for the rest of the day.

Stan Jablonski, a criminal investigator with the District Attorney's Office in Nashville, testified that a year before the trial he was asked to collect a set of samples from the defendant. He said he collected the samples and sent them to Forensic Associates in San Francisco.

Detective Grady Elam testified that he was retired from the Metropolitan Police Department, where he had been the lead detective on the case. He said he arrived at the crime scene about 8:00 or 9:00 p.m. He said when he viewed the body, he thought the victim had been dead for at least seven or eight hours based on his observations. He estimated that she had been killed around 11:00

a.m. or 12:00 p.m. that day. He said he did not interview the victim's son, who had discovered the victim's body.

Detective Elam testified that he investigated the cards belonging to Fannie Parker and Renta Fuller that were found in the victim's apartment. He testified that shortly after the crime, he spoke with Parker, who reported that she parked her car at the Maxwell House Hotel, left her purse on the front seat with the window down, and went into the hotel. He said Parker stated that someone took her billfold from her purse. He thought Parker said she had gone to the Maxwell House to pick up her daughter's paycheck. He said that Parker gave the police a brown paper sack that had a light blue t-shirt in it and that she said she found the shirt in her car. He said that in 2003, he reinterviewed Parker. He said that despite her past report of the billfold having been taken at the Maxwell House, she told him on this occasion that the billfold was taken at the Kwik Sak Market, where she had gone to buy gas.

Detective Elam testified that Parker told them the shirt had blood on it but that by 2003 he was aware that the substance was paint. He said the color on the shirt was visually about the same color as paint at the community center where the defendant had been painting with the work detail. He said he collected samples of paint from the Osage Community Center and submitted them to the TBI lab for analysis. He said that later, he took Randall Nelson of the TBI to the community center to collect larger samples. He said that during the investigation, he learned that the defendant's sister, Celestine Crump, lived near the community center.

Detective Elam testified that he took the pink sheet, yellow towel, and two washcloths to the TBI lab for analysis. He denied having adulterated these items in any way. He said the striped washcloth was later sent to Life Codes in Valhalla, New York, because the TBI suggested Life Codes might be able to test it for DNA evidence. He stated that Life Codes then suggested he send the washcloth to the Forensic Science Center in Richmond, California, because Forensic Science Center was capable of doing more advanced testing. He said that the Forensic Science Center was not able to give a specific DNA profile from the washcloth in 1991 but that they agreed in 2003 to do additional testing based on new technology and were able to obtain a specific DNA profile. He said he submitted additional items to Forensic Science Center.

On cross-examination, Detective Elam said that if an alternative light source had been used to detect semen or sperm on any of the items from the scene that were trial exhibits, he did not see this being done. He said he did not know whether semen or sperm was found on the victim or any of the exhibits. He said he did not notice any obvious signs that the victim had been beaten. He said that there were cigarettes found in the defendant's home, despite the fact that the defendant's son told him the victim did not smoke. He said he did not see the white powder found by other officers at the crime scene. He said he did not recall seeing any hair rollers at the scene or seeing hair rollers on the victim. He also did not recall whether the panties, pantyhose, and shoes found in the victim's bedroom were in a pile or strewn all over the floor. He acknowledged he did not see any evidence of forced entry. He said he knew some fingerprints were lifted from the outside of the storm door but did not know about any on the inside of the storm door.

Detective Elam said he did not remember when he and Detective McElroy met with Fannie Parker, but he did recall her telling them that her billfold had been taken while she had been parked at the Maxwell House Hotel. He said he had no knowledge whether Parker had reported her billfold being stolen and did not recall Parker telling them that any money was stolen. He admitted that he did not interview Parker's daughter, Renta Fuller, because she was in jail at the time of the crime. He denied having any impression that Parker was trying to protect Fuller.

Detective Elam admitted that he was not entirely certain that he had placed the shirt he recovered from Parker in the property room before taking it to the TBI lab. Detective Elam said he did not recall any hairs being found on the shirt but acknowledged a form indicating hair samples had been collected from the shirt.

Detective Elam acknowledged that on October 17, 1988, he obtained a search warrant for the purpose of taking body samples of head and pubic hair, semen, saliva, and blood from the defendant. He said that he was present at the hospital to receive the samples from medical personnel but that he was not inside the room when the samples were taken. He said the semen sample was not taken and that he used a "form request," even though he did not want a semen sample. He said he was not aware of any untrue statements in his affidavit supporting the application for the search warrant. He said, however, that he had someone, he believed Assistant District Attorney Zimmerman, help him with the affidavit. He acknowledged that despite the fact he had stated in the affidavit that a pubic hair was found in the victim's mouth, laboratory results returned months before he signed the affidavit revealed that the hair was consistent with the victim's own head hair. He said that he had been told by other officers that the hair was a pubic hair and that he did not know whether he had seen the laboratory report before submitting the affidavit. He also acknowledged that his affidavit stated that semen stains were found on the victim's bed linens, despite the fact that a laboratory report issued months beforehand did not indicate the presence of semen on these items.

John Warner, M.D. testified that although he had no independent recollection, his records reflected that he collected samples and took cultures from the defendant in 1988. He said he collected blood, saliva, head hair, and pubic hair. He said that he did not take a semen sample and that he did not recall conducting a penile wash. He said he had never done either of these procedures. He said he also took specimens for cultures for venereal disease. He acknowledged that some of these tasks might have been performed by a nurse, rather than by him.

Anthony Bush testified that he was a certified nurse technician and that he was present when the biological samples were taken from the defendant. However, he said he had no independent recollection of the events. He said that he had been present when penile washes had been performed on patients but that the defendant's medical records reflected that none had been performed. He said he had never been present for collection of a semen sample.

Agent Constance Howard of the TBI testified as an expert witness in the areas of serology and DNA analysis. She said that in 1988, DNA analysis was not a common practice in the TBI and that neither she nor anyone she knew was doing DNA analysis at this time. She said that on August

30, 1988, she analyzed specimens which had been collected from the victim. She said she determined that there was no semen or sperm in the samples taken from the victim's vagina and anus. She also tested a saliva sample to determine whether the victim was a secretor and to determine what type of antigens were present. She said that on September 1, 1988, the laboratory received a blood sample from the victim, a house dress, a slip, and three washcloths. She said that she determined on October 4 that sperm from a person having Type A blood was present on one of the wash cloths. She said that on September 12, 1988, the laboratory received a t-shirt that she later determined had no blood or semen on it. She said the laboratory received specimens taken from the defendant on October 20, 1988, which consisted of a liquid blood sample, a saliva sample, and a penile wash. She said that she listed in her records only the items she tested and that there may have been hair samples or other items in the rape kit collected from the defendant. She said there was not a semen sample. She said the blood type from the defendant's penile wash sample was of a different type than the saliva sample and that "[s]omething was wrong" with this result. She said she later retested the gauze from the penile wash and determined that the biological material present could not be the defendant's because it was from a woman. She was unable to explain how the integrity of the evidentiary collection and storage process had been compromised. She said that on June 9, 1989, the laboratory received a pink fitted sheet, a washcloth, and a yellow towel. She said that she discovered the washcloth had sperm on it but that she did not discover sperm on the sheet or towel.

Agent Howard testified that blood from the vagina or defecation could flush semen or sperm from body cavities. She said these fluids might not be present if the perpetrator did not ejaculate.

Alan Keel testified that he was employed as a criminologist specializing in forensic serology at Forensic Science Associates in Richmond, California. He was allowed to testify as an expert witness in DNA. He said that Forensic Science Associates received various items related to this case in 1990, 1991, 2003, and 2005. He determined that there was sperm present on the pink sheet and yellow towel and that the DNA profile was compatible with the defendant. He said the defendant's profile was rare and that he would not expect it to occur more than once among all the people who had ever lived. He said that there was sperm present on a striped washcloth but that it was of an insufficient quantity to allow DNA testing. He said the sperm with the defendant's DNA profile was present on the white washcloth, yellow towel, and pink sheet. He said there was also blood and what appeared to be fecal matter on the yellow towel. He said a large area of semen was on the pink sheet. He said other substances were on the pink sheet, including matter consistent with blood and feces. However, he did not do any testing to confirm the presence of these substances. He said that a washcloth other than the white and striped ones, a white slip, a gown, a blue towel, and a comforter were examined but that nothing of significance was found. Mr. Keel testified that sperm may not always be revealed through examination with an alternative light source. He said the semen may be of a small quantity. He also said commingling of semen with other body fluids, such as blood and feces, may eliminate or reduce the fluorescence of sperm. He said he was positive of his identification of the defendant as the source of the sperm on the items from which he was able to recover sperm, provided that the defendant did not have an identical twin.

Agent Randall Nelson of the TBI laboratory testified as an expert witness in the areas of micro-analysis and paint analysis. He said the laboratory received a blue shirt containing paint and some paint samples from a structure on March 20, 2003. He said that when he began comparison of these items, he determined that he needed larger samples from the daycare center. He said that on June 3, 2003, he went with Detective Elam to the building to gather additional samples. He said that in most of the samples he collected, there were at least five layers of paint. He said that the elemental composition of one of the layers of paint from these samples was consistent with that of the paint on the blue shirt. He said that he collected one sample that was a drop of paint on a window and that its elemental composition was consistent with that of the paint on the t-shirt. He said, however, that paint was manufactured in large batches and that he could not say that the paint on the shirt came from the building where he took the samples to the exclusion of all other sources. He said that there were additional tests available that he could have performed but that he did not because he felt they were unnecessary.

Staci Turner, M.D., testified as an expert witness in forensic pathology. She said she was an assistant medical examiner for Davidson County. She said that Dr. Charles Harlan, who was the chief medical examiner in 1988, conducted the autopsy of the victim but that Dr. Harlan was no longer employed as the chief medical examiner. She said she had reviewed the case file of Dr. Harlan's autopsy of the victim. She said the victim was sixty-nine years old and weighed 103.2 pounds at the time of her death. She said no date and time of death were listed on Dr. Harlan's report. She said the cause of death was listed as ligature strangulation. She said that if firm, constant pressure were applied, death by strangulation could take only a few seconds until the victim loses consciousness and then minutes until death, or it could take "any number of minutes" if pressure were applied and released repeatedly. She said the blood that was noted coming from the victim's ears would not have been a result of strangulation. She also said that although vaginal bleeding in an elderly woman could be consistent with sexual assault, it was not uncommon for elderly women to have occasional bloody vaginal discharge. She said that the finding of feces around the anus could be consistent with sexual assault but that it was very common for the bowels to release at the time of death. She also stated that it was common for the urinary bladder to empty at the time of death. She said it was possible for there to be no physical findings despite the occurrence of a sexual assault. She said that semen may not be recovered from a rape victim's vagina or anus and that semen may be expelled with feces.

On cross-examination, Dr. Turner testified that no evidence of vaginal, anal, or oral rape was discovered by the autopsy. She said there was no evidence of trauma to the victim's ears. She said she was not familiar with any phenomenon of blood coming from the ears due to hypoxia, a deficiency of oxygen.

Doctor Turner testified that she had not spoken with former chief medical examiner Dr. Charles Harlan about his performance of the autopsy. She said that Dr. Harlan was no longer licensed to practice medicine and that the current medical examiner, Dr. Levy, had testified against Dr. Harlan in the license revocation proceedings.

Celestine Crump testified that she was the defendant's oldest living sibling and that there were nine children including herself and the defendant in their family. She said the defendant did not have a twin brother. She did not recall whether the defendant had come to her apartment on August 26. She acknowledged that a prior statement she had given to Detective Smith would be her best recollection of whether the defendant had been at her apartment on a given date and time.

James Wooten testified that he saw the defendant sometime after September 26, 2003, at the correctional facility where they were both confined. He acknowledged that he was serving a twelve-year sentence for two convictions of selling cocaine. He said that the defendant had been told that there was a fifteen-year statute of limitations for murder and that the defendant inquired whether he knew if that was correct. He said he discussed the evidence with the defendant. He said that the defendant denied shooting or stabbing the victim but that he stated that the victim had been strangled with an extension cord. He said the defendant told him that the murder had occurred in a duplex off Twelfth Avenue near a senior citizens' tower where Wooten's mother-in-law lived. He said that the defendant was later taken to be arrested and processed for the murder charge and that when the defendant returned, he shook his head and said, "Well, they got me. Fifteen years to the day. I can't believe all this over \$20." He said he did not understand the defendant's comment about twenty dollars.

Mr. Wooten testified that he made notes about his conversations with the defendant and that after their first conversations, he gave the notes to his attorney and instructed the attorney to give them to Detective Elam. He said he had known Detective Elam for about twenty-five years and had helped him in other matters. He said that he later spoke with Mr. Gray, an investigator from the District Attorney General's office, and that he neither requested nor was promised any help for his cooperation. He said he had decided to come forward for two reasons. First, he considered Detective Elam a friend despite the fact that they were on "different sides of the fence." Second, he worked at a nursing home before his incarceration and had "a lot of feeling for the elderly people." He denied that his attorney had ever told him that the prosecution had promised to write to the parole board on his behalf in exchange for his truthful testimony, and he stated that if such a conversation had taken place between his attorney and the prosecution, he was unaware of it.

Mr. Wooten testified that he did not know whether the defendant discussed the crime with other inmates. He said he had not discussed the defendant's admissions with other inmates. He said he was "pretty sure" the defendant told him that when the defendant was initially arrested for the murder in 1988, the authorities had collected a semen sample, as well as hair and blood samples.

Tommy Miller testified that he met the defendant in 2003 in a correctional facility. He said that they discussed their respective legal situations and that the defendant mentioned the statute of limitations and inconsistent DNA test results. He said that he advised the defendant he would need an explanation about his DNA and that the defendant stated that he would say that the woman he was accused of raping was his girlfriend. He said the defendant told him that he took money from the victim for drugs. He said that the defendant told him he first beat the victim in an attempt to gain money but that the defendant said that he later "would go up in that a - -" to get the victim to give

him money. He said the defendant's recitation of various facts about the crime were contradictory. He said the defendant reported having taken \$20 at one point but said \$50 later. He said the defendant stated he had stabbed the victim because he did not want a witness to the crime. He claimed the defendant also told him he had choked the victim. He said the defendant claimed he had been able to obtain entry to the victim's home because they were in an ongoing sexual relationship. He said the defendant also told him that the victim's son disapproved of and tried to interfere with the victim's and the defendant's relationship. He said that the defendant was nonchalant about the crime and that the defendant's goal was to have the charges dismissed before trial.

Mr. Miller testified that he wrote a letter to a detective whose name he saw on the defendant's legal documents and that Detectives Elam and McElroy later visited him. He said that after he spoke with the detectives, they wrote a letter on his behalf to an Ohio judge regarding charges he had pending in Ohio. He said that he had not been promised any favorable treatment for his testimony and that he would be released in two months because he had a determinative sentence. He said he was testifying because he envisioned his grandmother and other people's grandmothers when the defendant told him what he had done. Mr. Miller acknowledged many prior convictions that included theft, safecracking, breaking and entering, and receiving stolen property.

Rivers Perry testified that he was an administrator of a correctional facility at which the defendant had been housed with Tommy Miller and James Wooten. He said that given the nature of the way these prisoners were housed, the defendant would have been able to speak privately with either man at various times. He said that the defendant and Miller were housed in the same guild from September 8 through October 30, 2003, and that the defendant and Wooten were housed together from September 8 through September 17, 2003.

The defense called Donald Dawson, who testified that he began representing the defendant as the defendant's attorney in 1988 or 1989. He said that he met with the prosecutor and that he was sure he had received discovery documents. He said he was informed the State's evidence would show that on the date of the victim's murder, credit cards taken from a car at the Maxwell House Hotel were later recovered from the victim's home. He said the allegations included that the victim had been raped and strangled. He said his standard practice would have been to share this information with the defendant and that if the defendant had requested copies of the discovery documents, he would have provided them. He said, however, he did not know what documents were in the defendant's possession in 2003.

Rick Berry testified that he was a private investigator. He said he prepared a map which depicted the locations of the community center at 1811 Osage, the defendant's sister's home, the Maxwell House Hotel, and the Kwik Sak at 4160 Clarksville Highway. He said that in traveling from the community center to the defendant's sister's house, a person would not pass in a straight line either the Maxwell House Hotel or the Kwik Sak. He said that Eleventh Avenue South was across town.

Mr. Berry testified that he spoke with Fannie Parker twice in 2005. He said he showed her a photographic lineup of four shirts and asked her to identify the one that most closely resembled the one left in her car in 1988. He said she identified a blue short-sleeve t-shirt from the photograph, which also depicted a sleeveless red shirt, a white undershirt, and a long-sleeve gray shirt. He said she stated, however, that the shirt was white, rather than blue as represented in the photograph.

Mr. Berry testified that he went to the Metro Police Department property room in January 2005 and reviewed the evidence. He said there was an item labeled “penile wash” that was inside an item marked “suspect rape kit.”

Detective Mike Smith of the Metro Police Department testified that he was on the homicide squad in 1988 and participated in the investigation of the victim’s death. He interviewed Celestine Crump, who told him that the defendant had come to her house on the 2400 block of Twenty-Fifth Avenue North on the day of the victim’s death around 9:00 a.m. He said Ms. Crump reported that the defendant asked her and then her son Reggie for money and that Reggie gave him fifteen dollars. He stated that Ms. Crump also said that the defendant talked to someone on the phone for about thirty minutes and that she overheard him tell the person he would see the person in about thirty minutes. He said Ms. Crump stated that the defendant left her house at about 10:30 a.m.

Charles Harlan, M.D., testified that in 1988, he was the Davidson County Medical Examiner and the Deputy State Medical Examiner. He visited the scene of the crime on the evening of August 26 shortly before midnight and conducted the autopsy of the victim on August 27 at 7:00 p.m. He said the victim had been dead for twelve to twenty-four hours at the time of his initial examination at the scene. He determined that the cause of death was ligature strangulation with a power cord. He found no evidence of vaginal, anal, or oral rape. He said that blood from the victim’s ears could have been caused by either decomposition or compression of arteries and veins from ligature strangulation and that he believed both contributed in this case. He said the only other evidence of trauma he observed was five bruises on the interior right shin, which he said he could not connect to the victim’s death. He said there was no evidence of internal or external trauma in the victim’s genital, anal, or oral area, which he said he would have expected to find had there been a forcible rape. He said that feces was around the anus and that there was frequently a loss of sphincter control resulting in defecation and urination in strangulation deaths. He said that he found bloody fluid from the victim’s vagina but that this was something that could occur with advancing age and was seen frequently in pathology.

Doctor Harlan testified that he used swabs to obtain samples from the victim’s mouth, anus, and vagina and that upon microscopic examination, he found no semen or sperm present. He said that if semen or sperm had been deposited in the rectum and defecation had taken place at or around the time of death, the semen or sperm would still be present in the material on the swab due to the technique he used in collecting the sample. Likewise, he said that his sampling technique would have collected sperm or semen deposited in the vagina, despite a bloody discharge, and sperm or semen deposited in the victim’s mouth, despite any oral discharge or bleeding. Doctor Harlan

testified that a curly black hair was in the victim's mouth. The hair was collected to be sent to the TBI for analysis.

On cross-examination, Dr. Harlan stated that he was never informed that semen mixed with blood and feces was recovered from a bedsheet and yellow towel that were found with the victim's body. He said he did not consider this relevant information in determining whether sexual activity had occurred. He said an alternate light source was used at the scene on the night of the crime but that no semen was detected. He said it would be very unusual for semen not to be detected by an alternate light source but then to be found by other means.

Doctor Harlan acknowledged that his medical license had been revoked permanently by the Board of Medical Licensure in May 2005, but he stated the matter was on appeal and was without a final determination. He said that he left the Davidson County Medical Examiner's office in 1994 and that Dr. Bruce Levy, who had been the Davidson County Medical Examiner since 1997, had been the primary witness against him in the license revocation proceedings. He described himself and Dr. Levy as business rivals and stated his belief that this rivalry had been Dr. Levy's motivation for testifying against him in the revocation proceedings. He said he had never spoken with Dr. Staci Turner about the victim's autopsy but would have provided her with any information she requested. Doctor Harlan admitted that the Board of Medical Licensure had based its revocation upon findings that he had been guilty of five instances of unprofessional conduct, three instances of dishonest conduct, two instances of making false statements, eight instances of negligence, one instance of fraud or deceit involving medical practice, one instance of signing a certificate known to be false, two instances of malpractice, and five instances of incompetence. He said, however, that since the revocation, he had testified several times for the State of Tennessee in criminal prosecutions.

After receiving the evidence, the jury found the defendant guilty of first degree premeditated murder, first degree felony murder in the perpetration of rape, first degree felony murder in the perpetration of larceny, and aggravated sexual battery. Following a capital sentencing hearing, the jury imposed a verdict of life imprisonment for the first degree murder convictions, which were merged by the trial court. The trial court later dismissed the aggravated sexual battery conviction based upon the statute of limitations. This appeal followed.

I

The defendant challenges the sufficiency of the convicting evidence for both the felony murder and premeditated murder convictions. He attacks the State's proof with respect to (1) the DNA evidence, (2) the connection of the defendant to the stolen credit cards found at the crime scene and to the paint-stained t-shirt, (3) the testimony of the inmates about the defendant's statements about the crime, and (4) the proof of premeditation. He contends that flaws in these lines of proof render his convictions unsupported by sufficient evidence. The State responds that when the evidence is viewed in the light most favorable to it, both forms of first degree murder were proven beyond a reasonable doubt.

Our standard of review when the sufficiency of the evidence is questioned on appeal is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

The statute under which the defendant was convicted states in pertinent part:

Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

T.C.A. § 39-2-202(a)(1) (1988).

We begin with a review of the evidence regarding the DNA proof, the connection of the defendant to the stolen credit cards and the paint-stained t-shirt, and the inmates’ testimony. We conduct this review in the light most favorable to the State.

The State’s evidence at trial included proof that the defendant’s DNA was found on items collected at the victim’s home. These items included a pink sheet, yellow towel, and white washcloth, all containing sperm with DNA that was consistent with the defendant’s profile. Mr. Keel testified that the defendant’s profile was rare and that he would not expect it to occur more than once among all the people who have ever lived. The defendant attacks the sufficiency of the proof of the chain of custody of the biological evidence and makes reference to his theory that incriminating evidence in the form of the sperm sample allegedly taken in 1989 but not accounted for thereafter was planted and explains the presence of the defendant’s DNA on the crime scene items. However, the defendant was permitted to present his own proof and to cross-examine the State’s witnesses about the chain of custody, the alleged semen sample, and evidence contamination. Detective Elam testified that no semen sample was taken and that the paperwork indicating otherwise was in error. Any suggestion of contamination of evidence was not supported by any direct proof, and any indirect proof was so attenuated and speculative as to be implausible. The DNA proof was thoroughly presented and tested at the trial. The jury had the opportunity to evaluate the credibility of the evidence and the witnesses with respect to the DNA evidence.

The defendant also challenges the sufficiency of the proof connecting him to the theft of the credit cards later found at the victim's home and to the paint-stained t-shirt. He argues that the witness who established the connection of these items to the crime was inconsistent in her testimony and that the "paint" evidence was speculative because the paint on the t-shirt was "consistent" with paint from the community center and there was no proof about when or how many times the community center had been painted. The defendant is correct that Ms. Parker testified that the credit cards were taken from her purse and that the t-shirt had been left in her car at a convenience store notwithstanding other evidence that she initially reported these events took place at the Maxwell House Hotel. The jury had the testimony of Ms. Parker and the police officers to whom she made her initial report before it and had the opportunity to resolve the inconsistencies by accrediting the evidence it found credible. With respect to the evidence about the paint on the t-shirt, the defense was allowed to cross-examine the State's paint expert and to highlight the limits of his opinions regarding the similarities between the paint on the t-shirt and a layer of paint at the community center. Further, although the defendant contends that the State failed to offer proof about when or how many times the community center had been painted, he has not explained how this is fatal to the State's case. The record does not reflect any dispute that the defendant was part of an inmate painting crew working at the community center on the day of the crimes.

The defendant also argues that the proof offered by inmates Wooten and Miller was insufficient. He attacks their credibility by arguing that they provided nothing more than information that the defendant already had through the discovery process. He claims that their testimony is proof of nothing more than that the defendant had access to information from his case file. However, the testimony of Mr. Miller provided a motive for the premeditated murder in that Mr. Miller testified that the defendant killed the victim to prevent her from reporting the rape and theft. Mr. Miller's testimony also provided proof that the motive for the rape was to obtain drug money. Although the defendant claims that his conversations with these inmates "proves no more than that he discussed with jailhouse lawyers ways he might possibly defend himself," the witnesses' testimony provided information about the defendant's motives, which was beyond the factual scope of discovery and defense strategy. The jury had before it the testimony of these witnesses and had the opportunity to observe them, evaluate their credibility, and determine what weight, if any, to give this proof.

Finally, the defendant states without explanation or argument that there was not sufficient proof of premeditation. As noted above, premeditated first degree murder was defined at the time of the offense as a willful, deliberate, malicious, and premeditated killing. First degree felony murder included a killing committed in the perpetration or attempted perpetration of a rape or larceny. See T.C.A. § 39-2-202(a)(1) (1988). In the light most favorable to the State, the defendant went to the victim's home seeking money in order to obtain drugs. When he was unable to obtain money, he raped the victim. Evidence of the rape included the defendant's semen, identified by DNA correlation, on bed and bath linens from the victim's home. In order to keep the victim from reporting that he had raped her and stolen from her, he killed the victim by strangling her with an electrical cord. According to the State's proof, death by strangulation would take minutes, even if pressure were firm and constant. The defendant admitted, as well, that he took money from the victim. In the light most favorable to the State, the proof demonstrates that the defendant committed

a willful, deliberate, malicious and premeditated killing of the victim. It demonstrates, as well, that the defendant committed a killing in the perpetration of both a rape and a larceny. The evidence is sufficient to support these convictions.

II

The defendant contends that his rights to a speedy trial and to due process under the Federal and State Constitutions were violated by the delay between the original indictment in 1988, and the reindictments in 2003 and 2004, and the trial in 2006. The defendant argues that the State's claims of (1) newly discovered evidence based upon the defendant's inculpatory statements to fellow inmates and (2) the development of new DNA technology should be discounted because DNA evidence of the type used in this case had been approved, developed and used at least twelve years before the reindictments and the defendant's inculpatory statements did not occur until after the 2003 reindictment. The State responds that the defendant is not entitled to relief because he has not demonstrated either prejudice or that the State caused the delay to create a tactical advantage.

At the outset, we note that the defendant has not separately addressed his right to a speedy trial under the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution and his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 8 of the Tennessee Constitution. Although the delay between the commission of an offense and the initiation of formal proceedings does not violate a defendant's right to a speedy trial, it may violate the defendant's right to due process. State v. Gray, 917 S.W.2d 668, 671 (Tenn. 1996).

A. Due Process

First, we examine the defendant's right to due process regarding the pre-indictment delay. The offenses were committed in August 1988, the defendant was apprehended approximately one month later, the State dismissed the charges in 1993, and the reindictment after the dismissal of the first indictment did not occur until August 2003. Interestingly, the defendant has changed his position on the length of the delay during the course of these proceedings. In this court, he argues that the preindictment delay should be measured from 1988 until 2003, which is what his written memoranda in the trial court stated, as well. However, at the hearing on the pretrial motion to dismiss based upon a delay violating due process, trial counsel stated on the record, "[W]e are not charging the State with delay for anything that occurred between the arrest in 1988 and the dismissal of the case in 1993. What is at issue here is the period 1993 to 2003." Whether the delay that is chargeable to the State is ten years or fifteen years, we consider it to be substantial.

In State v. Dykes, 803 S.W.2d 250, 256 (Tenn. Crim. App. 1990), relying upon United States v. Marion, 404 U.S. 307 (1971), this court stated that "[b]efore an accused is entitled to relief based upon the delay between the offense and the initiation of adversarial proceedings, the accused must prove that (a) there was a delay, (b) the accused sustained actual prejudice as a direct and proximate result of the delay, and (c) the State caused the delay in order to gain tactical advantage over or to

harass the accused.” In State v. Utley, 956 S.W.2d 489, 495 (Tenn. 1997), the supreme court acknowledged the “Marion-Dykes” analysis for cases of delay in charging a defendant. We note, though, that in United States v. Lovasco, 431 U.S. 783 (1977), involving preindictment delay, both the majority and dissenting opinions looked to the prosecution to justify the delay. This raises a question as to whether the United States Supreme Court continues to require a defendant to prove the State’s intent regarding its actions and inactions before charges are brought. See, e.g., United States v. Sowa, 34 F.3d 447, 451 (7th Cir. 1994) (holding that once the defendant has proved actual and substantial prejudice, government must provide its reasons for delay, to be balanced against prejudice, to determine whether due process has been denied); Howell v. Barker, 904 F.2d 889, 895 (4th Cir. 1990). However, in United States v. Gouveia, 467 U.S. 180 (1984), the Supreme Court stated that a defendant must prove the delay in bringing the indictment was “a deliberate device to gain an advantage over” the defendant. Id. at 192 (citing United States v. Lovasco, 431 U.S. 783 (1977) and United States v. Marion, 404 U.S. 307, 324 (1971)). See also United States v. Crouch, 84 F.3d 1497, 1510-14 (5th Cir. 1996) (rejecting the balancing approach and holding that defendant must show that the prosecution acted intentionally to gain a tactical advantage).

In their written memoranda and at the pretrial hearing on the motion to dismiss the indictment, the defendant’s attorneys argued that the delay prejudiced the defendant in several ways. First, Larry Cartwright had died. Counsel stated that Mr. Cartwright was an employee of the Department of Correction, was in charge of the work detail at the community center, and would have been able to testify about the painting at the community center on the day of the crimes. Defense counsel acknowledged that the defendant’s former counsel was able to cross-examine Mr. Cartwright at the preliminary hearing. Second, counsel argued that the defense would likely be compromised at trial in the area of DNA evidence because of (1) witnesses’ fading memories about the collection of specimens near the time of the crime and (2) the opportunities for cross-contamination of the evidence and false positive test results due to handling by multiple laboratories and the authorities. Third, counsel argued that the defense was compromised in presenting mitigation evidence at a capital sentencing hearing because expert evidence about the defendant’s mental state in 1988 when the crimes were committed would be seen as less credible when coming from a witness or witnesses who did not have the opportunity to evaluate the defendant at that time. Fourth, the State did not reindict the defendant for the offense until he was about to have a parole hearing and the statute of limitations on the rape charge was about to expire. Fifth, under State v. Carico, 968 S.W.2d 280 (Tenn. 1998), the reliability of the result of the trial is inevitably impaired by a lengthy delay. Sixth, the defendant’s ability to develop an alibi defense was compromised by the memory loss of any witnesses who might be located. The defendant argued, as well, at the hearing on the motion for new trial that the trial evidence had been conflicting about the length of time between the offenses, the time of death, and the defendant’s escape from the painting crew and that an alibi defense would have been particularly difficult to construct and present due to the passage of time. The State argued in its response to the defendant’s motion to dismiss that the case had been brought to prosecution after many years’ delay based upon the discovery of new witnesses and the development of new DNA technology. When the issue was raised again in the motion for new trial, the State argued in response that the delay was occasioned by “development of D.N.A. in the scientific community.” The trial court denied the motion on the basis that there was nothing to indicate that (1) the

defendant's right to a fair trial had been prejudiced and (2) the state caused the delay in order to obtain an advantage.

On appeal, the defendant argues that the length of the delay in this case is *prima facie* unreasonable. He also contends that the inmate witnesses, James Wooten and Tommy Miller, who testified against the defendant, testified about conversations they had with the defendant following his reindictment and that the discovery of them could not have been the reason for the delay in reindicting the defendant. He also argues that case law reflects that the type of DNA testing used in this case, PCR technology, was available to the State at least twelve years before the reindictments and therefore cannot provide justification for the delay. He likewise argues that the delay was prejudicial to his opportunity to develop an alibi defense, to investigate and develop evidence of another perpetrator having committed the crimes, to have accurate witness testimony about memory of actual events rather than about routine or habit, to have biological samples which were free of the specter of cross-contamination and false positive results, and to attack or neutralize the effect of any witnesses relative to painting at the community center.

We agree with the defendant that sufficient delay occurred in this case to trigger a due process inquiry. *See, e.g., Carico*, 968 S.W.2d 280 (conducting due process inquiry in case involving seven-year delay between offense and arrest); *Uteley*, 956 S.W.2d 489 (five-year delay). While we do not dispute that the passage of several years, as here, may be prejudicial to the defense, there is no indication in the present case that the defendant has suffered any prejudice. The defendant's allegations of prejudice are based almost entirely upon conjecture. There is no proof that Larry Cartwright had any information that was critical to the defense which was not explored in his sworn testimony at the preliminary hearing. There is no proof that the DNA evidence was cross-contaminated or that the handling or degradation of that evidence led to false positive results. In fact, there was proof presented in the course of pretrial proceedings that sperm was not initially detected through laser testing done on some of the items in 1988 because the sperm was obscured by other biological evidence but that it was detected later following advances in scientific knowledge. There was also proof presented that there were advances in DNA testing such that some techniques used in the subsequent tests had not been available during the initial testing in 1988 and 1989. Detective Elam testified in pretrial proceedings that to the best of his knowledge, no semen sample had been taken, that his having indicated one was taken on the search warrant return was a mistake, and that he had never seen one collected as part of a rape kit. Detective Elam also testified at a pretrial hearing that the hospital used a standard rape kit and that he received the samples collected in a box from hospital personnel. The trial court specifically discredited the defendant's testimony that a sperm sample had been taken and found no proof of evidence having been planted by agents of the State. Although many of the witnesses who testified about collection and chain of custody of the DNA evidence testified about their typical practices rather than their specific recollection of actions taken with respect to this case, it is not unusual for witnesses who routinely collect, store, or test evidence to testify about their habits or the routine practices of their organizations. *See* Tenn. R. Evid. 406. Further, there was contemporaneously created documentary evidence which supported much of the testimony. The defense was allowed to cross-examine the witnesses about the concerns of cross-contamination, tampering, and invalid results. There is no

evidence of prejudice to the defendant at sentencing because of the lack of mental health evidence at or near the time of the crimes because the defendant received a life sentence, the least severe punishment possible for his crimes. The defendant has not shown that any witness had memory loss which prejudiced the development of an alibi defense. Despite the defendant's allegation that the State reindicted the defendant for the offense when he was about to have a parole hearing and the statute of limitations on the rape charge was about to expire, this is not proof of an attempt by the State to obtain a tactical advantage, and there is no indication the State was motivated by tactical considerations. We acknowledge that the defendant appears to be correct that the two inmate witnesses, Wooten and Miller, did not come into contact with the defendant until after the reindictment, albeit possibly before the arraignment. However, this does not prove that the delay of the prosecution was for the purpose of obtaining a tactical advantage for the State. After consideration of all these arguments, we hold that the trial court did not err in finding that the defendant had not shown that his due process right to a fair trial was prejudiced by the delay and that the state caused the delay in order to obtain a tactical advantage. The trial court properly denied the motion to dismiss the indictment.

B. Speedy Trial

We consider next the defendant's claim that his right to a speedy trial was violated. We are hampered in our review by the fact that the defendant alleged on appeal that a speedy trial violation occurred but failed to address this argument distinctly from his claim of a due process violation.

Once the State initiates criminal proceedings, the right to a speedy trial is implicated under the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution. This right is statutory, as well, in Tennessee. T.C.A. § 40-14-101 (2006). In Barker v. Wingo, 407 U.S. 514, 530 (1972), the Supreme Court devised a balancing test to determine whether a defendant received a speedy trial and identified the following factors for consideration:

- (1) the length of delay.
- (2) the reason for the delay.
- (3) the defendant's assertion of his right to speedy trial.
- (4) the prejudice to the defendant.

Id., 407 U.S. at 530. In State v. Bishop, 493 S.W.2d 81 (Tenn. 1973), the Tennessee Supreme Court implicitly adopted the Barker balancing test for our state's constitutional and statutory right to a speedy trial.

In the present case, the defendant was indicted in August 2003, arrested shortly thereafter, arraigned in September 2003, and tried in a capital case proceeding in May 2006. A delay which approaches one year is sufficient to trigger further inquiry. Doggett v. United States, 505 U.S. 647, 652 (1992); Utley, 956 S.W.2d at 494. However, the complexity of the case is taken into account in evaluating the reasonableness of the length of the delay. State v. Wood, 924 S.W.2d 342, 346

(Tenn. 1996) (citing Barker, 505 U.S. at 652). The length of the delay in the defendant's case is sufficient for us to evaluate the remaining three Barker factors.

The record reflects that this was a complex capital case and that it was vigorously defended in pretrial motions practice, including at least two requests by the defense for additional time to file pretrial motions and a request for permission to file a delayed motion to suppress evidence. Continuances of trial were granted to both sides. No demand for a speedy trial appears in the technical record. Finally, the defendant has not articulated how he was prejudiced by the delay between indictment and trial, as distinct from the delay between the commission of the crimes and reindictment. Upon review of these factors, we conclude that the defendant was not denied his constitutional right to a speedy trial.

III

The defendant has raised two issues related to the jury panel. First, he claims the trial court erred in denying his motion for a mistrial relative to extraneous information about the case imparted to some of the prospective jurors, at least one of whom served as a juror. Second, he claims that the State violated Batson v. Kentucky in exercising its peremptory challenges during jury selection. The State contends that neither issue has merit.

A. Denial of Motion for Mistrial - Extraneous Information Provided to Jury Pool and Juror

The defendant has several complaints about extraneous information reaching the jury pool. For clarity, the potential jurors involved will be identified by number.

The record reflects that during jury selection, a potential juror stated during individual voir dire that she heard a conversation between Prospective Juror #1 and Prospective Juror #2 in which the second asked the first why the defendant's case was so old but just being tried and the first responded that the defendant was in jail for another crime and was identified through DNA evidence. The potential juror said she also overheard in this conversation that the victim was an elderly woman. In the process of choosing the jury, the prospective jurors were questioned whether they had overheard conversations about the case. A photograph of Prospective Juror #1 was shown to the other prospective jurors during questioning. Neither the prospective juror who first alerted the court to the matter nor any other prospective juror who identified himself or herself as having overheard the conversation were seated on the jury.

Additionally, the record reflects that Prospective Juror #3 reported during group voir dire that she had some information about the case. Later, when questioned individually, she said that she had a telephone conversation with a friend in which the friend stated that the defendant had been incarcerated in East Tennessee. She said those were the only details imparted to her and denied having received any information about the nature of the conviction. She said she had said "hello" to Prospective Juror #1 but denied any further conversation with her. Prospective Juror #3 did not serve on the jury panel.

Prospective Juror #4 stated that she overheard Prospective Juror #3 attributing the reason for the delay between the crime and the defendant's trial as being due to the defendant's incarceration and the case not proceeding until that period of incarceration was over. Prospective Juror #4 said that she was not sure but that Prospective Juror #3 may have said that the defendant was serving time "on a murder case." Prospective Juror #4 was excused for cause by the trial court.

Prospective Juror/Juror #5, informed the court after she was selected for the jury but before the trial began that over the weekend, a family member told her, "There was a purse with the defendant." The court then removed the remaining jurors from the courtroom and questioned the juror. She said that she had not solicited the information and that she told her family member not to say anything further. She said this was the only information she had received. This juror was not removed from the panel, and the court later gave the entire panel an instruction that there was no proof of the defendant having been found in possession of a purse and that the jury should disregard this.

The defendant contends that the trial court should have granted a mistrial due to these incidents, which he contends resulted in prejudicial, inadmissible, and unconstitutionally obtained information reaching the jury pool. Normally, a mistrial should be declared only if there is a manifest necessity for such action. Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The decision of whether to grant a mistrial is within the sound discretion of the trial court. State v. McKinney, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). This court will not disturb that decision unless there is an abuse of discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990); State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). A manifest necessity exists when there is "no feasible alternative to halting the proceedings." State v. Knight, 616 S.W.2d 593, 596 (Tenn. 1981).

With respect to the incidents other than the one involving Prospective Juror/Juror #5, the defendant has not shown that any of the extraneous information reached the actual jurors who served on the case, as opposed to members of the jury pool who did not serve. The defendant's argument presumes that the information was received by members of the final jury panel, but the record does not establish that this took place. Both of the cases upon which the defendant relies for the proposition that jurors may be so tainted by prejudicial information such as prior convictions that they may not serve impartially involved situations in which highly prejudicial information was received by members of the jury, as opposed to some members of the jury pool. See State v. Kilburn, 782 S.W.2d 199 (Tenn. Crim. App. 1999); State v. Caffey, 729 S.W.2d 266 (Tenn. Crim. App. 1986). Indeed, the very nature of jury selection involves the elimination of prospective jurors who have information or beliefs which would preclude them from deciding the case impartially based upon the evidence presented at trial. Without some indication that the jurors who served received extraneous information, we decline to hold the trial court in error for denying a mistrial.

In so holding, we have considered and rejected the defendant's argument that he was not required to establish actual prejudice because the conduct of Prospective Jurors #1 and #2 involved concealment or failure to disclose information during voir dire which reflected adversely on their

impartiality. See Carruthers v. State, 145 S.W.3d 85, 95 (Tenn. Crim. App. 2003). We note, however, that neither of these prospective jurors served on the jury which decided the case. The presumption of prejudice that arises in situations of concealment or failure to disclose information reflecting a lack of partiality has been applied to jurors who have determined the defendant's guilt, not to members of the jury pool who did not serve. Id. The defendant suggests that there was a "high risk" that the jurors were provided with extraneous information. However, this is not equivalent to a juror's actual knowledge of prejudicial, extraneous information. We are not persuaded that prejudice should be presumed.

We consider next the statement by Prospective Juror/Juror #5 in the presence of the other seated jurors about having heard that there was a "purse with the defendant." The court separately inquired of Prospective Juror/Juror #5 and determined that the family member who imparted the information had not made any additional statements about the facts of the case and that Prospective Juror/Juror #5 had not engaged in any misconduct by discussing or soliciting the information. Prospective Juror/Juror #5 said she "[a]bsolutely" could disregard the information if the court so instructed. The court then instructed the full panel that the information was false and should be disregarded. There is no indication the jury did not follow this instruction. The evidence developed at trial likewise did not place the defendant in possession of a purse. Rather, the evidence was that the defendant stole credit cards from a purse and that the cards were later recovered at the victim's house. This evidence was consistent with the court's instruction. Given the court's instruction that the information about the purse was not accurate and should be disregarded, we hold that the trial court did not abuse its discretion in its determination that there was no manifest necessity for a mistrial.

B. Batson Error

The defendant also complains that the State violated Batson v. Kentucky, 476 U.S. 79 (1986), during jury selection by striking African-American jurors from the panel. The defendant argues that the State's proffered explanation of its reason for striking one prospective juror in particular was not sufficient to overcome the Batson challenge. The defendant also argues, without any explanation or citation to the record, that "a full analysis of other responses by struck and unstruck prospective jurors may well uncover other pretextual rationales." We will address the Batson issue with respect to the stricken African-American jurors generally and with respect to the specifically identified African-American juror. However, we decline to consider the defendant's invitation to review the record for potential violations which he has failed to identify. See Tenn. Ct. Crim. App. R. 10(b); T.R.A.P. 13(b).

The State contends that this court should decline to consider the Batson issue altogether because the defendant has failed to preserve in the record his exhaustion of peremptory challenges. The State is correct that the record is not clear with respect to which party or parties exercised challenges with respect to each prospective juror. However, the record does contain a statement by defense counsel that the defense had exhausted all of its peremptory challenges. The State did not

contest this assertion, which was made during argument on the Batson motion. Thus, we will consider the Batson issues on the merits.

Batson held that the Equal Protection Clause prohibited the prosecution's exclusion of potential jurors based solely upon their race. Id. at 89; cf. Georgia v. McCollum, 504 U.S. 42, 59 (1992) (extending rule to peremptory challenges made by defendant). In order to determine whether a peremptory challenge has been exercised based upon a prospective juror's race, the defendant must first establish a prima facie case of purposeful discrimination. Batson, 476 U.S. at 96. Second, the prosecution must be allowed an opportunity to rebut the prima facie case by offering a race-neutral reason for the challenge. Id. at 97. If the prosecution does so, the court must then determine, based upon the facts and circumstances, whether the defendant has established purposeful discrimination. Id. at 98.

A prosecutor's race-neutral explanation must be reasonably clear and specific. Id. at 98. However, it need not be persuasive, or even plausible. Purkett v. Elem, 514 U.S. 765, 767-78 (1995). "Unless discriminatory intent is inherent in the prosecutor's explanation, it will be deemed race neutral." Id. at 768. However, the trial court has the obligation to examine the proffered race-neutral explanation and assess its plausibility in light of all of the evidence and to determine that the explanation is not pretextual. Miller-El v. Dretke, 545 U.S. 231, 251-52 (2005).

The record reflects that the State exercised seven of eleven peremptory challenges to strike prospective jurors who were African-American. To explain the strikes, the State offered the testimony of one of the assistant district attorneys general who prosecuted the case. She said that the three assistant district attorneys general "were all in agreement that we wanted as many African-Americans on the jury as possible." She said, "We felt that was appropriate in a case where the victim was African American as well as the defendant. We felt like it was important to have a large number of African Americans on the jury." She offered the following explanations for the African-Americans who were stricken by the State from the jury panel:

1. Prospective Juror was young, immature, had a bad attitude, did not seem to want to be there.
2. Prospective Juror said on the questionnaire that she was "somewhat opposed" to the death penalty. On voir dire, she hesitated and was equivocal about her ability to return a death verdict.
3. Prospective Juror said she did not think she could serve on the case. The father of Prospective Juror had just been released from the Department of Correction after serving twenty years for rape. She was "extremely upset" when asked if she knew anyone at the Department of Correction.

4. Prospective Juror had an inappropriate affect and might alienate other jurors. He seemed to change his views “at the drop of a hat.”

5. Prospective Juror stated on the questionnaire that she was strongly opposed to the death penalty. She said she thought the decision to take life should not be man’s. She said she could support the death penalty in cases such as cannibalism, mutilation, or serial killings.

6. Prospective Juror was somewhat opposed to the death penalty on the questionnaire. She was equivocal whether she could impose the death penalty, and prosecutors thought she ultimately would not be able to do so.

7. Prospective Juror strongly opposed the death penalty. She had a pending felony charge for aggravated assault with a gun.

The assistant district attorney general also testified that all strikes were exercised for race-neutral reasons.

Following the assistant district attorney’s testimony, the defense raised a second Batson challenge, based upon the State’s preference for African-American jurors, alternatively to its first, based upon exclusion of African-Americans. The assistant district attorney general then testified about the reasons for striking each of the four prospective jurors who were not African-American:

1. Prospective Juror was clearly opposed to the death penalty and had a situation involving violence in her background.

2. Prospective Juror was the only remaining juror who had any information about one of the prospective jurors who had made factual statements about the defendant. The State thought that removing this prospective juror, [notwithstanding] his favorable views on the death penalty, was prudent in the event the trial court erred with respect to the situation with the extraneous information having been disseminated.

3. Prospective Juror was strongly opposed to the death penalty and thought a life sentence was cruel.

4. Prospective Juror made very odd remarks and had unusual affect. There was a concern that this individual was a person who “has a thing about the government.”

The trial court denied the motion, both as to purposeful exclusion of African-American jurors and as to purposeful exclusion of non-African-American jurors. The court found that the testimony of the assistant district attorney was credible and that the State offered race-neutral, rational explanations for striking both the African-American jurors and the non-African-American jurors.

We consider first the defendant's challenge to the exclusion of the seven African-American prospective jurors, aside from his specific challenge to the exclusion of one of these prospective jurors. In so doing, we are unpersuaded of any race-based exclusion of these jurors from the panel. The State explained its reasons for striking each of them, and upon consideration of the evidence, no discriminatory intent is inherent. See Elem, 514 U.S. at 768.

We consider next the defendant's argument that purposeful exclusion of only one juror is sufficient for him to prevail on a Batson claim and that the State purposefully excluded, based upon race, the prospective juror who was opposed to the death penalty but could support it in cases such as cannibalism, mutilation, or serial killings. The defendant argues that the State's explanation for excluding this juror was pretextual because it was at odds with this prospective juror's statements during voir dire. This individual stated on her questionnaire that she was strongly opposed to the death penalty but that she could impose a death sentence depending on the facts. She explained that she answered that she was strongly opposed to the death penalty because when she answered the question she thought a man should not "give a decision of death." She said that she had been thinking, however, about situations in which she would choose the death penalty. When asked to give examples of such situations, she responded, "I don't know offhand, but such as an example, a serial killer, mutilation, any type of case like that when it dealt with maybe serial killers of children or anything of that nature, cannibalism. They murder, they eat them, they mutilate them. Something of that nature." We hold that the trial court did not err in determining that this prospective juror was not purposefully excluded based upon her race. The reasons offered by the assistant district attorney general are supported by the record.

IV

A. Impeachment with Suppressed Confession

The defendant challenges the trial court's ruling regarding impeachment of the defendant if he testified. He claims first that the trial court erred in ruling that he could be impeached with his 1988 confession, despite the fact this confession had been suppressed. He also argues that the trial court erred in ruling that he would be subject to full cross-examination if he testified about the facts and circumstances of the alleged forcible collection of a sperm sample in 1988.

Regarding impeachment with the suppressed 1988 confession, the State concedes that the trial court's ruling was in error, and we agree. Our supreme court has ruled that this confession was taken in violation of the defendant's constitutional rights and was not given voluntarily. Crump, 834 S.W.2d at 270-72. Because the confession was not voluntarily given, it was not available to the State

for cross-examination of the defendant, had he testified. See Dickerson v. United States, 530 U.S. 428 (2000); State v. Walton, 41 S.W.3d 75 (Tenn. 2001); Crump, 834 S.W.2d at 270.

We hold, however, that the error was harmless beyond a reasonable doubt. To the extent that the defendant may have testified about a conspiracy to frame him for the offense through the involuntary collection and planting of DNA evidence, we note that his credibility was assessed unfavorably by the trial court when he testified about this matter at the hearing on the motion to suppress. Further, the State offered several witnesses at this hearing who rebutted the defendant's claim, and the trial court assessed the credibility of these witnesses favorably. To the extent that the defendant may have offered testimony that he had nothing to do with the crimes on trial, the physical and testimonial proof against him stands in stark contrast. We conclude that the trial court's erroneous ruling was harmless beyond a reasonable doubt.

B. Full Cross-Examination

The defendant contends the trial court erred in ruling that the defendant was subject to wide-open cross-examination if he testified in limited fashion about his claim that a semen sample was forcibly taken from him. The defendant argues that he was permitted by Tennessee Rule of Evidence 104(d) to testify about the collection of the semen sample and that the trial court erred in relying on Rule 611(b) without considering Rules 104(d) and 611(b) together. He claims that his state and federal constitutional rights to present an effective defense were violated by the court's rulings.

The relevant evidentiary rules are as follows:

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility, except as provided in paragraph (d) of this rule [pertaining to calling an adverse party in a civil case].

Tenn. R. Evid. 611(b).

The accused does not by testifying upon a preliminary matter become subject to cross-examination as to other issues in the case.

Tenn. R. Evid. 104(d).

The defendant seeks a ruling from this court which would allow him to offer testimony to establish a defense without being subject to cross-examination about the crime itself. This is not permitted by the Rules of Evidence. Rule 104(d) pertains to preservation of a criminal defendant's Fifth Amendment privilege in preliminary matters, such as pretrial motions to suppress. See Cohen, et al., Tennessee Law of Evidence § 1.05[1][c] (5th ed. 2005). At trial, the scope of cross-examination of a criminal defendant is defined by Rule 611(b), which permits cross-examination on any relevant subject including credibility. Tenn. R. Evid. 611(b).

The flaw with the defendant's argument is that his claim of the forcible collection of a sperm sample is not a preliminary matter. See Tenn. R. Evid 104(d). Further, his proof regarding forcible collection of a sample goes to the question of his guilt or innocence. A defense theory involving the defendant's denying that his biological evidence was deposited at the crime scene and on the victim during the crime are tantamount to a denial that the defendant committed the crimes, and relevant cross-examination would include the issue of whether the defendant committed the crimes. See Tenn. R. Evid. 611(b). Given these facts, we hold that the trial court did not err in its ruling on cross-examination of the defendant if he testified about the collection of a sperm sample.

V

The defendant contends that the trial court erred in denying his motion to dismiss the indictment based upon his allegations of police and prosecutorial misconduct and in imposing an inadequate remedy in its order suppressing the evidence obtained from a 1989 search warrant. The warrant permitted the taking of blood, saliva, and hair samples from the defendant and resulted in the gathering of DNA evidence against the defendant after testing of the seized items. The State responds that the trial court's rulings were not in error and that the defendant received the relief he requested with respect to suppression of the blood, saliva, and hair samples.

As a preliminary matter, we note that the statement of the issue in the defendant's brief contended that the trial court erred in part "in the Remedy it Fashioned when the Court Granted Defendant's Motion to Suppress Fruits of the 1988 Confession." However, in the defendant's argument section of his brief and in his reply brief, he argued that the trial court erred in its rulings with respect to the suppression of the 1989 search warrant evidence, not the fruits of the 1988 confession. We have addressed the issue as stated in the defendant's argument concerning the 1989 search warrant evidence, rather than as stated in his statement of the issue concerning the 1988 confession.

A. Motion to Suppress Evidence

Because the allegations of the motion to suppress are common to some of the allegations of the motion to dismiss, we consider the motion to suppress first. The defendant's motion to suppress the DNA evidence obtained from the blood, saliva, and hair samples as a result of the November 8, 1989 search warrant was based upon allegations of wrongdoing by the State's agents in drafting an affidavit containing false statements in order to obtain the warrant.

At the hearing, the defendant called Detective Elam to testify. Detective Elam stated that although he was currently employed as a part-time investigator for the district attorney's office, he was employed until his retirement in December 2004 with the Metropolitan Police Department. He said that in the latter capacity, he was involved in the execution of a search warrant for samples from the defendant's body in 1988 and 1989. He said that the 1989 search warrant was necessary because the defendant's 1988 statement had been suppressed and the basis for obtaining the 1988 search warrant had been the confession. In seeking the 1989 warrant, he submitted an affidavit prepared

by himself and Assistant District Attorney John Zimmerman in October 1989. He said that General Zimmerman “was helping me with the wording of it, because we were trying to get it into the legal jargon of [an] affidavit.” The affidavit stated in part:

Certain evidence was collected from the victim’s residence and the victim’s body which was located at 1231 11th Avenue South. At the crime scene, various semen stains were found upon items of [evidence] collected by police officers. Further, a pubic hair was found inside the mouth of the victim. The appearance of the victim’s body indicates that she was sexually assaulted contemporaneous with the murder. The items were sent to the Tennessee Bureau of Investigation Crime Laboratory which conducted certain tests on the items. Semen stains were found on the victim’s bed linens. Semen stains were also found on a wash cloth which also contained defecation. . . .

. . .

On September 27, 1988, one month after the defendant’s escape from a work detail and the discovery of the body of [the victim], he was arrested at 1490 11th Avenue South on an outstanding escape warrant. The above address is within one block of the victim’s apartment. If the suspect following his escape from the work detail located at 18th Avenue South and Underwood Street in North Nashville followed the most direct route from the point of escape to his sister’s apartment it would pass through the location where the auto burglary occurred. Det. Mike Smith interviewed the sister of [the defendant] and confirmed that [the defendant had] been to his sister’s apartment.

Detective Elam testified that his statement about the pubic hair was based upon descriptions of the hair by Detective Gordon McGwire and Dr. Charles Harlan, despite the fact that the FBI crime lab had determined seven months before he signed the affidavit that the hair was consistent with the victim’s head hair. He said he did not know when he saw the FBI report. He said the statement in the affidavit about semen stains on the bed linens was based upon information from Detective McGwire and the identification officers who processed the crime scene that stains of unknown origin were on the linens. He admitted, however, that the TBI issued a report in July 1989 stating that spermatozoa was on a washcloth but not that semen was found on the bed linens. He acknowledged a TBI report did not state that feces was on either of the two washcloths which contained semen. He said that he was unsure whether he had seen the TBI reports before he signed the affidavit but that he assumed he had. He stated that Ms. Parker told him credit cards were stolen from her car at the Maxwell House Hotel and that he was aware she presently denied having said that. Regarding his statement in the affidavit that there was almost a direct route from the community center to the

Maxwell House to the defendant's sister's house, he said that "they could be" almost a direct route "as the crow flies." After being shown maps, he acknowledged that it was not a direct route to the defendant's sister's house and said the statement in the affidavit "was probably just worded." He acknowledged that he stated in the affidavit that he had spoken with a confidential informant despite the fact that another law enforcement officer talked to the informant and relayed the information to General Zimmerman, who then relayed the information to him. He said he had no recollection of having spoken with the informant.

Fanny Parker testified at the hearing that items were stolen from her car at a Kwik Sak market on Clarksville Highway in August 1988. She said she did not know how the location of the theft got mixed up as having been the Maxwell House Hotel. She said that police officers came to see her several times and that she did not remember whether Detective Elam had been one of the ones to whom she spoke in 1988.

Investigator Terry McElroy testified that he was currently employed by the district attorney's office and was employed as a homicide investigator with the Metropolitan Police Department in 1988. He said that he and Detective Elam interviewed Ms. Parker on August 27 or 28, 1988, and that she told them that the theft from her car happened at the Maxwell House Hotel.

The trial court granted the defendant's motion to suppress the evidence obtained as a result of the November 1989 search warrant. The court made the several findings of fact pertinent to its ruling. First, the court accredited Detective Elam's testimony that he had reasonable information to believe the hair he represented to be a pubic hair was in fact a pubic hair and that he was not aware of the FBI report to the contrary at the time. Second, the court accredited the testimony of Detective Elam and Investigator McElroy that Ms. Parker told them in 1988 that her car was burglarized at the Maxwell House Hotel. Third, the court found that Detective Elam was reckless, rather than knowingly false, in making the inaccurate statement about there being semen on the bed linens. Fourth, the court found that Detective Elam's statements about the defendant's travels in a direct route after escaping the work detail were intentionally false and bespoke an effort to deceive the court. Fifth, the court found that Detective Elam made a deliberately false statement about having personally interviewed the confidential informant. The court's order suppressed "the blood, saliva, and hair samples taken from [the defendant] pursuant to [the] Court's order of November 8, 1989 and . . . further suppress[ed] the testing or other derivative evidence."

Following the suppression ruling, the State moved for a continuance and applied for and obtained a new search warrant. Biological samples were again taken from the defendant and submitted for testing. The defendant argues that "this was no remedy at all, given the gravity of the misconduct found." The defendant argues that the trial court's order addressed exclusion of the evidence seized but not its fruits. He claims that in addition to suppressing the blood, hair, and saliva evidence obtained pursuant to the tainted search warrant, the trial court should have suppressed "the testing against crime scene evidence that resulted as a 'fruit' of obtaining [the defendant's] biological samples."

The defendant relies upon State v. Little, 560 S.W.2d 403 (Tenn. 1978). In Little, a law enforcement officer knowingly made false statements of material facts in an affidavit submitted to obtain a search warrant for the defendant's home. The supreme court held that the trial court erred in not suppressing evidence obtained from the search warrant. The result was that the Little defendant's convictions were reversed and the charges dismissed in the absence of the inculpatory but suppressed evidence. Id.

In examining the proper scope of the evidentiary suppression, we note that under the "fruit of the poisonous tree" doctrine, evidence that is obtained through exploitation of an unlawful search or seizure must be suppressed. See Wong Sun v. United States, 371 U.S. 471, 488 (1963). However, "[p]ursuant to the independent source doctrine, an unlawful entry does not mandate the suppression of evidence located inside a residence if the evidence is subsequently discovered following the execution of a valid warrant based upon facts independent and separate from information discovered as a result of the unlawful entry." State v. Carter, 160 S.W.3d 526, 532 (Tenn. 2005); see State v. Clark, 833 S.W.2d 597, 600 (Tenn. 1992). "The underlying policy of the independent source doctrine is that 'while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied.'" Carter, 160 S.W.3d at 532 (quoting Murray v. United States, 487 U.S. 533, 542 (1988)).

The problem for the defendant in the present case is that the opportunity for a search of his body for blood, hair, and saliva samples was not transitory, as is the opportunity for a search in many other cases, such as Little, where the invalidation of the search warrant leaves the authorities without the opportunity to obtain the evidence anew. Further, the defendant has not cited any authority for the proposition that the proper remedy was a wholesale exclusion not only of the evidence obtained directly or derivatively from the search warrant but also any as-yet unobtained biological evidence from the defendant and evidence of any comparison of that as-yet unobtained evidence to the crime scene evidence. Such a broad evidentiary suppression would be contrary to the principles of the "independent source doctrine" and would place the State in a worse position than it would have been absent the police misconduct. See id. We hold that the trial court did not err in the scope of its suppression ruling.

We note, as well, that with respect to the continuance that was granted to the State following the trial court's suppression ruling, the record reflects that the suppression of the evidence was not the only basis upon which the State sought a continuance. Further, the defense indicated at a status conference that it was unsure whether its scientific testing of evidence would be completed in time for the scheduled trial date. To the extent that the defendant's argument about the remedy may be construed as a complaint that the trial court granted the continuance to allow the State to pursue a new search warrant and testing, we hold that the court's ruling was not in error.

B. Motion to Dismiss Indictment or Strike Notice of Intent to Seek Death Penalty

The defendant argues that the trial court erred in denying his motion to dismiss the indictment or to strike the notice of intent to seek the death penalty on the basis that he was deprived of due

process by the pervasive misconduct of State actors. The defendant's motion alleged "pervasive prosecutorial misconduct" in (1) depriving the defendant of his right against self-incrimination, (2) depriving the defendant of his due process rights in deliberately employing intentional and reckless false statements in order to obtain biological samples pursuant to the November 1989 search warrant, (3) attempting to deprive the defendant of his rights to counsel and against self-incrimination upon his arrest after reindictment in 2003 by delaying his appearance before a magistrate judge, driving him past the crime scene, and attempting to interrogate him, and (4) depriving the defendant of his due process rights by deliberately contaminating crime scene evidence with the defendant's biological specimens.

The trial court held a hearing on the defendant's motion. The defendant testified that he was arrested by Detectives Elam, Moore, Smith, and Moran in September 1988 and that he was returned to the Department of Correction the day after his arrest. He said that sometime following the arrest, he was taken by Metropolitan Police officers from the Department of Correction to Nashville General Hospital, where blood, saliva, head hair, pubic hair, and semen samples were taken from him. He said that the semen sample was taken forcibly and that a doctor and three police officers were in the room but that no nurse was present. He said he was not given a copy of the search warrant at the prison or hospital.

The defendant testified that Detectives Grady Elam and Al Gray came to the prison where he was housed in 2003 and advised him he had been charged again. He said Detective Gray read him his rights. He said he told Detective Gray he wanted a lawyer. He said Detective Gray told him to sign a document and pointed to two places to be signed. He said that he signed the rights waiver form that had a check mark beside a statement that he invoked his right to remain silent. He said he told Detective Gray he could not see well enough to sign the form and that he signed the form in the place to which Detective Gray pointed.

The defendant testified that after he signed the form, he was put into a patrol car and taken to the jail and booked. He said that on the way, Detective Gray tried to talk to him about the reason he had been arrested but that he declined to talk to the detective. He said Detective Gray continued to attempt to engage him in conversation. He said Detective Gray eventually told Detective Elam he wanted to go to the crime scene. He said they drove to the area and stopped in the street. He said Detective Elam made comments about the crime scene and the location where the defendant had been arrested. He said the crime scene was not along a direct route from the prison to the jail. He said that after he was booked, Detective Elam gave him a business card and told him he could still talk with him if he wanted.

Constance Howard testified at the hearing that she was a forensic scientist special agent with the TBI and that she specialized in the area of serology DNA analysis. She said she was also the administrator of Tennessee's CODIS database, which is the State's combined DNA index system for convicted offenders. She said that the TBI laboratory received evidence for analysis on August 30, 1988. She said that this group of evidence included a slide from the medical examiner's office, a saliva sample from the victim, a vaginal swab from the victim, and an anal swab from the victim.

She said she did not detect sperm on any of these items. She said the laboratory received a washcloth on September 1, 1988, on which she detected sperm. She said that she ultimately did not detect semen on a fitted sheet the laboratory received on June 9, 1989, although two areas of the sheet fluoresced in a preliminary test. She said various fluids would make an item fluoresce, including semen, saliva, and urine. She said that a towel received in June 1989 did not fluoresce and that she did not examine it further. She said she found sperm on a washcloth submitted in June 1989. She said no other items from the crime scene that she examined demonstrated the presence of semen or spermatozoa.

Special Agent Howard testified that the TBI did not begin doing DNA analysis until the 1990's. The parties stipulated at the hearing that the washcloth received by the TBI on September 1, 1988, a hand towel, a pink fitted sheet, and a yellow towel were all later linked to the defendant through DNA testing done by Forensic Science Associates. With respect to the yellow towel, Special Agent Howard said that the areas on the towel where Forensic Science Associates later matched sperm to the defendant through DNA analysis appeared to be within or very near brown stains that were noted as "possible feces." She said that as this type of analysis was done over time, it became known that laser light used for preliminary detection of semen would not fluoresce with dark matter.

Special Agent Howard testified that the TBI laboratory received the defendant's rape kit on October 20, 1988. She said the contents of the rape kit box consisted of a liquid blood sample, a saliva sample, and penile wash sample. She said that her records did not indicate that head or pubic hair samples were included and that there was no semen sample in the box. She said that semen samples were not typically taken from suspects and that she had received only two semen samples in nineteen years.

John Warner, M.D., testified that he was a general surgery intern at Vanderbilt Medical School in 1988 and 1989 and that during that time he worked at St. Thomas, Vanderbilt, and General Hospitals. He said that as part of his duties at General Hospital, he took samples from the defendant consisting of urethral and rectal cultures for gonorrhea, two tubes of blood, a saliva swab, and scalp and pubic hair samples. He said he did not have actual recollection of having performed the procedures on the defendant, and he referred to his records in testifying. He said that there was no record he had taken a semen sample and that he had never taken a semen sample from a patient. He said that the records did not indicate a penile wash had been performed and that he did not recall having done a penile wash.

Anthony Bush testified that he was a certified nursing technician at Metro Nashville General Hospital and that he was present when samples were taken from the defendant on October 17, 1988. He said he had been employed at the hospital for twenty-two years and had been involved in over 100 collections of biological samples from suspects. He said that according to the records, no semen sample was taken from the defendant and that he had never been present for taking a semen sample. He said, "[W]e've never taken semen samples." He said that the detectives usually waited outside the examination room while he and a doctor performed the procedures. He said that at the time, he

was always present when samples were taken from male suspects. He said that if a penile wash was not checked on the form in the records, then it had not been performed.

Detective Grady Elam testified that he obtained a search warrant to obtain specimens from the defendant in October 1988. He said that he served the search warrant on the defendant and took him to Metro General Hospital. He said he had some recollection of the events, although he was not clear on some of the details. He said he had no knowledge of a semen sample. He acknowledged that he had written on the search warrant return that a semen sample had been taken but that when he did the return, he “just wrote down what [he] thought [they] got.” He said this had been a mistake. He said that he told the charge nurse he wanted a rape kit performed and that he did not know of what a rape kit consisted. He said that he was outside the examining room most of the time and that someone from the hospital would have given him a box containing the samples after they were collected. He said he called Detective McGwire to come to the hospital to take the rape kit from him. He said the procedure would have been for the items to have been placed in a drying cabinet and then taken to the TBI laboratory after they had dried.

Detective Elam testified that he went with Detective Al Gray to a prison to serve a capias on the defendant and to transport him for booking on August 26, 2003. He said it was not his intent to question the defendant about the victim’s murder. He said Detective Gray advised the defendant of his rights. He acknowledged that on the rights waiver form that was used, there was a check mark on “no” beside a question whether the defendant wanted to waive his right to remain silent and that the defendant’s signature appeared on the form even though the form stated not to complete the form further if the defendant did not want to waive his right to remain silent. He admitted that the drive past the crime scene on the way from the prison to the Criminal Justice Center had been a deviation from a direct route but denied that the purpose was to elicit comments from the defendant.

Rick Berry testified that he was employed by a private investigation company working on the defendant’s behalf. He said that on January 21, 2005, he went with other members of the defense team to inspect the evidence at the police property room. He said the rape kit contained three items, one of which was labeled “penile wash.”

Al Gray testified that although he was a former police officer, he did not work on the victim’s homicide case in the initial investigation in 1988. He said that his first involvement with the case was in his current employment as an investigator with the district attorney’s office, when he went with Detective Elam to serve a capias on the defendant on August 26, 2003. He said that before going to the prison, he and Detective Elam discussed going to the crime scene to look for the manager of the apartment complex. He said they did not go to the crime scene on their way to the prison because they had to be at the prison at a certain time or else they might have to wait several hours.

Mr. Gray testified that he advised the defendant of his rights and that he had the defendant sign the form to acknowledge having been advised of his rights. He said he did this even though the defendant did not wish to waive his right to remain silent.

Mr. Gray testified that after leaving the prison with the defendant, they went by the crime scene. He said that he sat in the back seat with the defendant but did not talk to him. He said the defendant appeared to be asleep.

In ruling on the motion, the trial court noted that the defendant had prevailed in having the defendant's inculpatory statement suppressed and in having the biological evidence from the November 1989 search warrant suppressed. With respect to the remaining allegations, the court observed:

The other two issues relate to this . . . contention that somehow the police planted evidence in this case. I must—I mean, I reject that. I do not credit Mr. Crump's testimony. I credit Dr. Warner and Mr. Bush's testimony, and I don't find any proof here that the State has—I shouldn't say the State, the police officers that are the actors here, did such a thing. There's certainly some sloppy recordkeeping. And I suppose the State's going to have to deal with that sloppy recordkeeping at the trial, and it's not going [to] inure to the benefit of the State during the trial, but that's something the State's attorneys are just going to have to deal with. But I don't find proof that there was the . . . planting of evidence.

Nor [do] I . . . think it was good judgment, given the history of this case, that . . . an investigator and a detective took [the defendant] by the crime scene on their way between the penitentiary and the police station, but there's obviously no Miranda violation. No statement was made as near as proof that I've heard, and I do not find that these officers . . . had any intent to violate Miranda. So, all that taken into consideration, this motion to dismiss the indictment and/or for me to strike the death penalty notice is overruled.

On appeal, the defendant argues that under State v. Culbreath, 30 S.W.3d 309 (Tenn. 2000), the trial court should have dismissed the indictment or stricken the State's notice of intent to seek the death penalty based upon prosecutorial misconduct. In Culbreath, a private prosecutor operated on behalf of the district attorney's office to prosecute crimes involving adult-oriented businesses. The private prosecutor was appointed a special assistant district attorney general. The private prosecutor's fees and some of his expenses were paid by Citizens for Community Values, Inc. The defendants were charged with crimes related to their operation of sexually-oriented businesses and sought disqualification of the district attorney's office and the private prosecutor. The supreme court held that the private prosecutor had a conflict of interest by virtue of his compensation by the special interest group and his role as a prosecutor with the district attorney's office, because he owed a duty of loyalty to both. The court noted that in rare instances, prosecutorial misconduct may rise to the level of violating a defendant's due process rights and mandate dismissal of the indictment. The court concluded that the involvement of the private prosecutor had so infected the proceedings, from

before the indictment was returned and continuing throughout the entire proceedings, that the trial court properly disqualified the private prosecutor and the district attorney's office and correctly dismissed the indictment. Id.

 In the present case, the defendant's tainted confession was taken in 1988, and the excluded biological samples were taken in 1989. The proceedings against the defendant were terminated by voluntary dismissal. The State obtained new evidence which led to the defendant's reindictment in 2003. The trial court completely rejected the defendant's allegation that the prosecution had engaged in planting evidence to create the inculpatory new evidence. Further, the court found that although the visit to the crime scene with the defendant had been ill-advised, there had been no intent to violate the defendant's constitutional rights. The trial court's findings are supported by the record, and we hold that the defendant has not demonstrated that the trial court erred in ruling that the defendant's due process rights were not violated. The trial court did not err in denying the motion to dismiss the indictment or strike the death penalty notice.

VI

The defendant argues that the trial court erred in allowing two of the State's experts, TBI Special Agent Forensic Scientist Constance Howard and Forensic Pathologist Dr. Staci Turner, to render expert opinions about semen being flushed from a victim's body cavities by the victim's bodily secretions. He claims that neither witness had relevant education, training, or experience and that neither was familiar with nor could refer to any scientific literature on the subject. The State responds that the court properly allowed the testimony with respect to Agent Howard and that the defendant waived any objection to Dr. Turner's testimony by withdrawing his objection. The State argues alternatively that with respect to both witnesses, even if the trial court erred, the error was harmless.

Rules 702 and 703 of the Tennessee Rules of Evidence address the admissibility of opinion testimony of expert witnesses. Rule 702 states in pertinent part: "If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Tennessee Rule of Evidence 703 requires the expert's opinion to be supported by trustworthy facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The determining factor is "whether the witness's qualifications authorize him or her to give an informed opinion on the subject at issue." State v. Stevens, 78 S.W.3d 817, 834 (Tenn. 2002). Evidence constitutes "'scientific, technical, or other specialized knowledge,' if it concerns a matter that 'the average juror would not know, as a matter of course.'" State v. Murphy, 953 S.W.2d 200, 203 (Tenn. 1997) (quoting State v. Bolin, 922 S.W.2d 870, 874 (Tenn. 1996)). Questions regarding the admissibility, qualifications, relevancy, and competency of expert testimony are left to the discretion of the trial court. McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 263-64 (Tenn. 1997). A trial court's ruling on the admissibility of such evidence may be overturned on appeal only if the discretion is exercised arbitrarily or abused. Stevens, 78 S.W.3d at 832.

A. Testimony of Special Agent Constance Howard

During direct examination, Agent Howard was asked about the tests she performed on the biological samples submitted to the TBI laboratory. She said she did not find semen or sperm on the items taken from the rape kit containing the victim's samples. The State inquired, "Do you have any explanation as to any factors that may have affected how semen could be washed out of the vaginal area or the rectal area?" The trial court ruled, over the defendant's objection to the witness's qualifications in this area, that the witness was qualified to offer her opinion about factors which would affect the presence or absence of sperm or semen in the tests the witness performed. Agent Howard then testified, "[B]lood could wash out the sperm and semen. Also if someone defecates after . . . anal sex, it could wash out, it could push out the sperm and semen. That would be the possible reasons we would not find sperm or semen."

On cross-examination, Agent Howard acknowledged that she had no training as a medical doctor or in forensic pathology. She said that she had not learned about the flushing of sperm or semen from bodily cavities as part of a class but that her opinion was based upon "things that I have seen in the past." She admitted that it was unlikely that a woman of the victim's age would have menstrual cycles and that this information would be important in determining whether menstrual fluids had flushed semen from the vagina. She said other factors which could affect recovery of semen or sperm from a victim would include the length of time since the substances were deposited and the lack of ejaculation by the perpetrator.

Upon consideration, we hold that the trial court did not abuse its discretion in determining that Agent Howard was qualified by her experience to testify about matters which could affect the results of the tests she performed. The record reflects that in addition to her educational background, consisting of bachelor's and master's degrees and various occupational training and continuing education courses, Agent Howard estimated that she had done thousands of DNA examinations and had been employed with the TBI laboratory since 1986. Agent Howard stated that she based her testimony on her occupational experience. The defense was allowed to cross-examine her fully about her experience, education, and lack of medical certification. The trial court did not err in admitting this evidence.

B. Testimony of Dr. Staci Turner

On direct examination, the State asked Dr. Turner, "Assume for me that a victim is anally raped and murdered, and at the time of the death, the victim voids the feces. In the feces found later, there is a mixture of feces and semen. Would you necessarily expect to find semen in the anus when you conducted the autopsy?" At a bench conference, the defense objected but then withdrew the objection. The State then restated the question, and Dr. Turner answered, "Not necessarily." She went on to explain that semen was not always recovered in the case of a vaginal or anal rape and that particularly with anal rape, semen might be expelled with feces. She stated that the absence of semen was not inconsistent with an anal rape having occurred.

We consider first the State's argument that the defendant waived any objection to this testimony by withdrawing his objection at trial. The defendant did, in fact, withdraw the objection before Dr. Turner answered the hypothetical question. However, the defendant argues in his brief that he "renewed" his objections to the testimony of both Agent Howard and Dr. Turner. However, the pages cited in the defendant's brief for the renewed objection pertain to the State's objection to Dr. Harlan testifying as an expert witness in forensic pathology. In the transcript, defense counsel refers to his objection to Agent Howard's testimony but does not "renew" any objection to Dr. Turner's testimony. Rather, the transcript reflects that defense counsel argued that he should be allowed to examine Dr. Harlan on the expulsion of semen in order to rebut the testimony of Agent Howard and Dr. Turner. The defendant did, however, raise the issue with respect to Dr. Turner in the motion for new trial. We hold that the issue was not waived. See T.R.A.P. 3(e) (providing for waiver of issue pertaining to admission or exclusion of evidence unless issue was raised in motion for new trial).

We hold that the trial court did not abuse its discretion in admitting this evidence. Doctor Turner was a medical doctor who was board-certified in anatomic, clinical, and forensic pathology. She had performed between one thousand and two thousand autopsies. She acknowledged that she had not conducted studies on the flushing of sperm with expulsion of feces at the time of death and that she was unaware of any literature on the subject. Nevertheless, she said her professional opinion was that this could occur. The record reflects that based upon her education, training, and work experience, Dr. Turner possessed knowledge that was scientific or specialized in nature relative to the subject and that such testimony would be of substantial assistance to the jury in understanding the autopsy findings. See Tenn. R. Evid. 702. Thus, she was qualified "to give an informed opinion on the subject at issue." See Stevens, 78 S.W.3d at 834.

VII

The defendant argues that the trial court erred in allowing Dr. Staci Turner to testify about the victim's autopsy, even though the doctor who performed the autopsy, Charles Harlan, was available to testify. The defendant offers no support for his contention that Dr. Harlan's availability precluded Dr. Turner's testimony. He argues, as well, that Dr. Turner's testimony confused and misled the jury, was not based upon personal knowledge, and lacked scientific foundation. The State responds that Dr. Turner's testimony was properly admitted.

The record reflects that Dr. Harlan was not employed as the chief medical examiner at the time of the defendant's trial. The State offered the testimony of Dr. Turner, who was a current employee of the medical examiner's office at the time of the trial. The autopsy report itself was admissible under Tennessee Rules of Evidence 803(6) (business records) and 803(8) (public records) and Tennessee Code Annotated section 38-7-110(a). Doctor Turner was qualified as an expert witness in forensic pathology. She testified about the report itself and her expert opinions based upon facts contained in the report. The trial court did not err in allowing her to testify in this regard. See State v. Davis, 141 S.W.3d 600, 629 (Tenn. 2004) (holding that medical examiner who did not perform the victims' autopsies was properly allowed to testify about autopsy reports where

pathologists who performed victims' autopsies were no longer employed by medical examiner's office and not engaging in analysis of unavailability as a prerequisite); State v. Stevens, 78 S.W.3d 817, 832 (Tenn. 2002) (holding that trial court may be reversed on admission of expert testimony only for abuse or arbitrary exercise of discretion); McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 263-64 (Tenn. 1997) (addressing general admissibility of expert testimony).

VIII

The defendant seeks a new trial based upon allegations of several instances of prosecutorial misconduct throughout the trial. The State argues that the defendant has failed to show misconduct occurred and that the complained-of actions had any effect on the jury's verdict.

Prosecutorial misconduct does not constitute reversible error unless the outcome was affected to the defendant's prejudice. State v. Bane, 57 S.W.3d 411, 425 (Tenn. 2001). In Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976), this court set out the following considerations for determining if the prosecutor's conduct could have improperly prejudiced the defendant and affected the verdict:

1. The conduct complained of viewed in context and in light of the facts and circumstances of the case.
2. The curative measures undertaken by the court and the prosecution.
3. The intent of the prosecutor in making the improper statement.
4. The cumulative effect of the improper conduct and any other errors in the record.
5. The relative strength or weakness of the case.

See State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984) (approving these factors in determining if the misconduct resulted in reversible error).

The defendant's first complaint relates to the prosecutor's reference in his opening statement to the defendant's "walking off a work detail." After the prosecutor made the statement, the court admonished the prosecutor, "Work detail carries with it some implication. The stipulation was painting crew." The defense then noted its objection to the use of the term "walking off," as well. The prosecutor then resumed, "At that time, [the defendant] was missing from a paint detail" The court again admonished the prosecutor. The prosecutor noted that he had used the word "missing," and the court told the prosecutor not to use the word "detail" again. No curative instruction was given with respect to the statements, although the jury was instructed that the attorneys' statements were not evidence. Thereafter, the stipulation was entered into evidence which

reflected that the defendant had been a member of a “painting crew” from which he was noticed to be “missing.”

Upon consideration of the Judge factors, we are unpersuaded that reversible error occurred. We note particularly that the statements made were brief and were not a focal point, that the jury had been advised that the opening statements were not evidence, and that the information was imparted to the jury correctly via the evidentiary stipulation.

The defendant’s second complaint concerns references to the defendant’s having been incarcerated. He complains about Tommy Miller’s testimony concerning Mr. Miller’s conversations with the defendant at the “penitentiary,” despite that the witness had been instructed to refer to the institution as a “correctional facility,” and about the prosecutor’s reference during closing argument to trial witnesses who were “inmates.” With respect to Mr. Miller’s testimony, the record reflects that this testimony was in response to questioning on cross-examination by the defense. The record reflects that the trial court admonished this witness before he testified that he should refer to the facility where he was incarcerated with the defendant as a “correctional facility.” The record also reflects no contemporaneous objection by the defendant to this testimony. The prosecutor’s reference in closing argument to witnesses who were “inmates” came during his rebuttal argument, in which he was addressing the defendant’s attack on the credibility of Tommy Miller and James Wooten. The prosecutor did not use the word “prison” in conjunction with his characterization of them as “inmates.” The record does not reflect that the defendant made a contemporaneous objection to the term “inmates.”

Upon consideration of these complaints in light of the Judge factors, we fail to see any deliberate intent by the prosecutor in Mr. Miller’s use of the word “penitentiary.” Indeed, the prosecutor was not involved in questioning the witness during this testimony, and there is no indication in the record that the witness disobeyed the court’s earlier instruction at the prosecutor’s urging. Further, the defendant failed to seek any curative measures either after eliciting the “penitentiary” reference on cross-examination or after the prosecutor’s “inmates” reference in closing argument. The failure to object contemporaneously constitutes a waiver. T.R.A.P. 36(a); State v. Little, 854 S.W.2d 643, 651 (Tenn. Crim. App. 1992) (failure to object to prosecutor’s alleged misconduct during closing argument waives any later complaint). We do not view the characterization of the witnesses as “inmates” to be inherently prejudicial, given that it was unavoidable that the jury would know that the defendant had been confined with the witnesses in a correctional facility. We conclude that the defendant has failed to show prejudicial prosecutorial misconduct with respect to these allegations.

Next, we consider the defendant’s claim that the State knowingly presented false testimony about whether there was an agreement between the State and witness James Wooten for Wooten’s favorable testimony. The record reflects that during the State’s direct examination of the witness, Mr. Wooten testified as follows:

Q. Did you ask your lawyer or did you ask Mr. Gray or myself if you were going to get any help for this information?

A. No, sir.

Q. What did we tell you?

A. No, no deal on it, but I didn't ask anyway.

Q. But it was made clear to you that there was not going to be any help for you; is that right?

A. Yes, sir.

...

Q. Mr. Wooten, why did you agree to tell this story to the jury after it was made clear to you by Mr. Gray and myself that you were not going to get any help on your present sentence?

A. Well, I guess it's a couple of reasons. Like I've said, I've known [Detective] Grady [Elam] for about 25 years. Even though we're on different sides of the fence, I still consider him a friend. And the other is because since 1990 or 1991 up until 2003, I worked with these elderly people. And I don't know, I really have a lot of feeling for the elderly people. They're kind of unique in their own way.

On cross-examination, defense counsel asked, "You say that you've been given nothing for your cooperation or coming in here today. Have you been promised that someone will put in a good word for you to try to get you out of jail?" Mr. Wooten responded, "No, sir." He likewise denied that he had talked to his attorney about any promises that had been made to the attorney on the witness's behalf. He then denied having ever been told by his attorney that the prosecution had promised to write a letter to the parole board for his cooperation and testimony. Outside the presence of the jury, the defense then produced a letter to defense counsel from an assistant district attorney general who had worked on the case before trial. The letter stated in pertinent part, "Jim Wooten has received no consideration for his testimony. His lawyer Robert Vaughn has been advised that our office will write a letter to the Parole Board about his cooperation if he testifies truthfully." The assistant district attorney general who questioned Mr. Wooten stated that he had not been aware of this agreement between another member of the district attorney general's staff and Mr. Wooten's attorney.

Upon consideration of these facts in light of the Judge factors, we believe it was improper for the State to have questioned Mr. Wooten in leading form about whether it was made clear that he would receive no help. We note, however, that the trial court observed that the assistant district attorney general "seems to be ignorant of that [agreement]." Further, the witness testified that he was unaware of any promise made to his attorney on his behalf. As noted by the trial court, it is possible, however improbable, that the agreement had not been communicated to Mr. Wooten by his attorney. We are unwilling to overlook the State's actions entirely, but the record does not reflect that there was a deliberate attempt to mislead the jury or the court, as opposed to a careless oversight. The trial court stated that the defense would be allowed to offer the letter as evidence if it chose to

do so, provided a redaction was made regarding another person who had provided information to the State. The defense stated that it might call Robert Vaughn to testify, but it never did so. The defense ably cross-examined Mr. Wooten on matters concerning his credibility, and the jury was aware that the witness had been convicted of drug charges and was serving twelve-year sentences. Despite the State's improper questioning, we hold that the defendant has not shown that he has been prejudiced.

The defendant also complains of prosecutorial misconduct in suggesting in its cross-examination of Dr. Charles Harlan and in closing argument that the defense had attempted to mislead Dr. Harlan by not informing him of DNA evidence. The record reflects that the cross-examination concerns whether Dr. Harlan was aware that since his autopsy of the victim, semen had been discovered mixed with the blood and fecal matter on a sheet and towel that were between the victim's legs. The State asked Dr. Harlan whether he found this information relevant in determining whether there was sexual activity. He responded, "As far as this victim goes, no. As far as in general information, [that] might be significant." He went on to explain that the fact that there was semen mixed in the matter on linens between the victim's legs "[was] significant only from the standpoint that it's there. . . . It doesn't have anything to do with the issue of the fact that they're negative on her body." There was no defense objection to this questioning. In closing argument, the prosecutor argued, ". . . [The defense] marched [Dr. Harlan] right up on that witness stand and they didn't tell him what you already knew. They intentionally withheld from him the information that was in the record. They never told him, Dr. Harlan—" At this point, the defense objected at the bench. The trial court ruled that the State could not "ascribe motives to [its] opponents," but that it would be permitted to "say Dr. Harlan was called and later learned, and perhaps he didn't know." The court then instructed the jury, "The objection is sustained. The jury will disregard that last line of argument by the State's attorney[.]" The prosecutor then continued his argument that Dr. Harlan had not been told about various findings with respect to the DNA on the linens and suggested that Dr. Harlan was a biased witness who would not have changed his mind on the witness stand because the case was an opportunity to air his grievances with Dr. Levy and to challenge Dr. Turner's opinions. The defense did not object to this portion of the argument.

Upon consideration, we are unconvinced that the State's questioning of Dr. Harlan was improper. The record does not reflect any intent by the State to ascribe ill motive to the defense in this line of questioning. We note, as well, that the defendant did not object to the questioning, thereby depriving the court of the opportunity to take any curative measures that the defense thought necessary. However, we agree with the defendant that the prosecutor's argument that the defense intentionally withheld pertinent information from Dr. Harlan was improper. The trial court quickly curtailed this improper argument, however, and the State's argument that Dr. Harlan was a biased witness was relevant to his credibility and was not improper. Considering the brevity of the improper argument in context of the entire argument and the corrective action taken by the trial court, we hold that the defendant has not demonstrated prejudice.

The defendant's next complaint is that the State committed prosecutorial misconduct during closing argument by stating incorrectly that neither Tommy Miller nor James Wooten had a conviction of a violent crime. The record reflects that after the prosecutor made this argument, the

defense objected and brought to the court's and the State's attention that Mr. Wooten had been convicted of a violent crime. The prosecutor then acknowledged his error when his argument resumed by stating, "I stand corrected. Mr. Miller has no record of crimes of violence." Upon review, we note that this misstatement was immediately corrected. There is no indication it was a deliberate misstatement. Further, we are at a loss to see how the defendant was prejudiced by it, given the immediate acknowledgment and correction by the prosecutor.

The defendant's final allegation with respect to prosecutorial misconduct in closing argument concerns statements about a false affidavit of Detective Elam. At trial, the defense vigorously impeached Detective Elam with problematic statements from the affidavit he submitted in support of the October 1988 search warrant. The trial court ruled that the affidavit could be admitted into evidence and that the defense could redact inadmissible information from the affidavit. However, the affidavit was not admitted as evidence. The record reflects that during closing argument, the prosecutor addressed the defendant's claims that Detective Elam had manipulated the evidence to the State's advantage. In his response, he noted that notwithstanding defense counsel's attempt to paint Detective Elam as having made false statements in the affidavit, the jury had not been shown the affidavit in order to judge that claim for themselves. The defense objected, and the trial court overruled the objection.

We do not view the State's argument as improper. We acknowledge that the trial court had made findings in pretrial proceedings which discredited some of Detective Elam's factual assertions in the affidavit. However, the trial court indicated its willingness to allow the affidavit to be admitted and for the affidavit to be redacted by the defense to exclude inadmissible information. The defendant claims without explanation that the affidavit could not be redacted effectively, but we are not inclined to see prejudice when no attempt was made to redact the affidavit and no explanation was offered for its futility.

Finally, we consider, as we are required to do under Judge, the cumulative effect of all misconduct from these various allegations. In so doing, we note that none of the improper actions of the State were significant in the context of the entire trial. We do not discern any pervasive and deliberate attempt to contaminate the process. We hold that the defendant has failed to demonstrate a claim of reversible error due to prosecutorial misconduct.

IX

The defendant argues in summary, two-sentence fashion that the trial court erred in allowing the State's cross-examination of Dr. Harlan, characterizing it as "abusive, irrelevant, hearsay, and had the effect of misleading the jury." The State responds that the defendant has waived our consideration of the issue by failing to offer argument and appropriate citations to the record and by failing to object to much of the cross-examination. Alternatively, the State argues that the cross-examination was proper because Dr. Harlan's license suspension was relevant to his qualifications as an expert witness.

We begin by noting that the State is correct that the defendant's argument with respect to this issue is not adequate and that the defendant's citation to the entirety of Dr. Harlan's testimony without further identification of the portions of the cross-examination which he contends was improper is likewise inadequate. A party who fails to comply with the Rules of Appellate Procedure and the Rules of the Court of Criminal Appeals is at peril of having its issues waived. See T.R.A.P. 27 (content of briefs); Tenn. Ct. Crim. App. R. 10 (inadequate briefs).

In any event, the trial court did not err in allowing the State to cross-examine Dr. Harlan about the status of his medical license. The court limited the extent to which the State was allowed to inquire about medical board proceedings relative to Dr. Harlan's license. The fact that Dr. Harlan's performance of his duties as a medical doctor had been the subject of disciplinary proceedings which had resulted in adverse findings was relevant to his qualifications and credibility as an expert witness. This was relevant evidence for the jury to evaluate in weighing Dr. Harlan's testimony.

X

The defendant contends that the trial court erred in denying a "missing witness" jury instruction with respect to a State's expert witness, Dr. Sinha. The State counters that the defendant has failed to establish the prerequisites for the giving of the instruction.

The instruction the defendant sought provides generally that if a party has the power to produce a witness with particular knowledge about the case but does not do so, an inference arises that the witness's testimony would have been unfavorable to the party that could have, but did not, call the witness to testify. See generally T.P.I. Crim. 42.16 ("Absent material witness"). In order for the missing witness instruction to be appropriate, "the evidence must show that 'the witness had knowledge of material facts, that a relationship exists between the witness and the party that would naturally incline the witness to favor the party and that the missing witness was available to the process of the Court for trial.'" State v. Middlebrooks, 840 S.W.2d 317, 334 (Tenn. 1992) (quoting Delk v. State, 590 S.W.2d 435, 440 (Tenn.1979)).

The mere fact that a party fails to produce a particular person who may have some knowledge of the facts involved does not justify application of the inference against him. However, when it can be said "with reasonable assurance that it would have been natural for a party to have called the absent witness but for some apprehension about his testimony," an inference may be drawn by the jury that the testimony would have been unfavorable.

State v. Francis, 669 S.W.2d 85, 88 (Tenn. 1984) (footnote omitted) (quoting Burgess v. United States, 440 F.2d 226, 237 (D.C. Cir. 1970)). The instruction may be given for lay or expert witnesses. Dickey v. McCord, 63 S.W.3d 714, 722 (Tenn. Ct. App. 2001).

The record reflects that during the defendant's proof but outside the presence of the jury, the State sought information about the witnesses the defendant intended to call before resting because Dr. Sinha had an out-of-state obligation and the State wanted to evaluate whether it could release him. One of the prosecutors said that the State was attempting to determine whether it might need to call Dr. Sinha as a rebuttal witness based upon the remaining defense witnesses to be called. After the defense announced the witnesses it anticipated calling, the court inquired whether the defense intended "to call a DNA person," and defense counsel stated that his present inclination was not to do so.

In the present case, the record does not reflect that Dr. Sinha was a material witness. Rather, it appears that he was an expert witness whom the State anticipated it might call on rebuttal if the defendant offered certain expert proof that ultimately did not materialize. There was no evidence before the jury that Dr. Sinha had unique or otherwise essential information from which a negative inference might be drawn about the State's proof, and indeed, there was no evidence before the jury that Dr. Sinha even existed. We hold that the trial court did not err in denying the defendant's request for the missing witness instruction.

XI

The defendant has raised the issue of whether the indictment should have been dismissed on double jeopardy grounds. Defense counsel notes that this issue is raised pursuant to Anders v. California, 386 U.S. 738 (1967) and has made no further argument. The State has declined the opportunity to respond, other than by arguing that the issue was waived by the defendant's inadequate argument, citation to the record, and citation to authority.

Anders does not provide a vehicle to allow counsel to represent a defendant on appeal, raising and briefing multiple issues, but to present another issue with no argument, references to the record, and no citation to authorities. See Anders, 386 U.S. 738; see also Tenn. Ct. Crim. App. R. 22. Counsel is to use professional judgment as to what issues should be raised, and our procedural rules require argument, references to the record, and citations to authorities. See Tenn. Ct. Crim. App. R. 22; T.R.A.P. 27(a). Without such, this issue is subject to waiver. Tenn. Ct. Crim. App. R. 10(b).

However, in the interest of justice, we have reviewed the issue and conclude that no double jeopardy violation occurred. The defendant was charged in 1988 with rape and murder of the victim. Those charges were voluntarily dismissed by the State in 1993. The defendant was reindicted in 2003, and a superseding indictment was returned in 2004. The 2003 reindictment did not violate double jeopardy because jeopardy had not yet attached in those proceedings due to the case being dismissed before the trial began. State v. Pennington, 952 S.W.2d 420, 422 (Tenn. 1997). Likewise, the 2004 superseding indictment did not violate double jeopardy because it was brought before jeopardy attached by the defendant being put to trial on the 2003 reindictment. See State v. Harris, 33 S.W.3d 767, 771 (Tenn. 2000) (noting that a superseding indictment may be brought at any time before a defendant is put to trial on the original indictment).

XII

Finally, we consider the defendant's claim of harm from cumulative error. Having found no substantial errors that would alter the outcome of the case, we hold that he is not entitled to relief on this basis.

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE